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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
APPELLANT,

vs.

NATIONAL SURETY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JULY 15, 1935.

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IN SUPREME COURT OF TENNESSEE

Davidson Equity

International Steel & Iron Company

v.

National Construction Company et al.

Opinion—Filed April 6, 1935

The question presented in this case is the liability of the contract surety of a defaulting highway contractor to the unpaid furnisher of material, the contractor having drawn the retainage (ample to cover all the claims) from the Highway Commissioner upon the execution of an indemnity bond. The surety on the indemnity bond has become insolvent. The chancellor held the contract surety liable. The Court of Appeals reversed the chancellor's decree.

In March, 1928, the National Construction Company entered into a contract with the Highway Commissioner to build for the State a bridge over the Tennessee River at Perryville. As required by chapter 74 of the Acts of 1917, the Commissioner took a bond from the contractor with the National Surety Company as surety. This bond was conditioned, [fol. 5] following the statute, "upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work."

During the course of the work, the International Steel & Iron Company furnished to the contractor for this project structural and cast steel at an agreed price of $135,020.53. An unpaid balance of $59,833.71 remained due on the steel company's account when the bridge was completed, July 2, 1930. This balance has since been reduced by some $40,000 in a manner not necessary to detail just here.

In due season, after the completion of the contract, the steel company filed notice of its unpaid claim with the

Highway Commissioner according to subsection (e) of section 1, chapter 80, Acts of 1929. The Commissioner had in his hands at that time the sum of $77,099.32 by way of retainage from the principal contract—an amount sufficient to pay all unpaid claims of laborers and materialmen of which notice had been given.

Chapter 74 of the Acts of 1917 provided that the Highway Department should not pay out more than ninety per cent of the contract price on any project before the work was completed and accepted, and provided that, before final settlement, publication should be made that such settle- [fol. 6] ment was about to be made, giving notice to all unpaid laborers, materialmen etc., to file their claims with the department. The statute continued:

"The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction."

See Southern Construction Co. v. Halliburton, 149 Tenn. 319.

The above quoted provision from the Act of 1917 was stricken by the amendatory act, chapter 80 of the Acts of 1929. In lieu of the quoted provision so stricken the latter statute, in section 1 thereof, substituted the following:

"(a) 'The Secretary of the Department (now the Commissioner of Highways and Public Works) shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow claimants to sue and prove their claims against the contractor or his agent, in some court of competent jurisdiction. In the event suit is brought against the contractor within the said sixty days from the date of the last advertising, by any claimant, [fol. 7] the Department or its officers shall pay the amount of said claim into court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.

"(b) 'On the date set for full and final settlement with the contractor, the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission, whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full.' "

Under authority of subsection (b) above, the Commissioner paid over the retainage to the contractor herein upon the execution by the contractor of a refunding bond with the Equitable Casualty & Surety Company as surety. We have heretofore noted that this surety became insolvent but after this suit was brought, as the result of negotiations between the receivers of said surety company and the Commissioner, approved by the chancellor, a new bond in the sum of $40,000 with a solvent surety was substituted for the first refunding bond. The original refunding bond was for $77,099.32. We assume it was made to appear to the court below that the insolvent surety on the original refunding bond would be able to pay it- debts in about the same proportion that the substitued bond bore to the origi- [fol. 8] nal bond.

The chancellor rendered a decree for the amount of the steel company's claim, less a credit of $1240 to which he found the contractor entitled, the decree running against the contractor and the National Surety Company, the contract surety. The Chancellor, however, directed the Consolidated Indemnity & Insurance Company, the substitute refunding bond surety, to pay into court the sum of $40,000, the penalty of the bond executed by it, and this sum was to be credited on the judgment against the contract surety.

The steel company contends that the release of the retainage by the Commissioner to the contractor was unauthorized, in violation of the steel company's contract rights, and having been made without its knowledge or consent, did not release the contract surety from liability for the steel company's claim. We are referred to a number of cases considering bonds similar to the one executed by the contract surety herein. Among others, decisions of this court in Cass v. Smith, 146 Tenn. 218, and Bristol v. Bostwick, 146 Tenn. 205. These bonds taken by governmental agencies are dual in nature. They undertake to secure to the obligee the faithful performance of the public work and also, by statutory requirement, undertake to secure to laborers and materialmen payment of their claims against the contractor. The cases cited rule that a breach of the contract, such as a substantial departure from the plans [fol. 9] or a dispersal of the retainage, although it may release the surety as to the direct obligee, does not relieve the obligation of the surety to laborers and materialmen not participating in the deviation. In none of the cases, however, did the governmental agency in such deviations act under direct legislative authority in paying out the retainage and in none of the cases was other equivalent security provided for laborers and materialmen.

The court has considered subsections (a) and (b) of section 1 of chapter 80 of the Acts of 1929 in several recent cases. Hurst v. Dawson Bros. & Beaver, 167 Tenn. 572; Campbell v. Cresap, 166 Tenn. 75; Equitable Casualty & Surety Co. v. Jackson, 163 Tenn. 54. In these cases it was said that (b) offered the contractor an alternative and permitted him by executing a refunding bond to withdraw his retainage and to avoid the tie-up of the retainage that otherwise would follow litigation over a disputed claim. The refunding bond, or indemnity bond, is substituted for the retainage.

It must have been contemplated that the release of the retainage by the Highway Commissioner, either under (a) or under (b)—the retainage being adequate to cover litigated claims—would discharge the surety on the contract bond from liability to laborers and materialmen. Otherwise the validity of (a) and (b) could scarcely be sustained. [fol. 10] Such retainage stood between the contract surety and such liability. The surety would not be called on by the unpaid claimants, ordinarily, if they could be paid out of the retainage. If the surety were required to pay such claimants, the surety would be subrogated to their rights against the retainage. The surety's rights with respect to the retainage, being contract rights, could not be taken away unless adequate security was substituted for the retainage and the Act of 1929 offers no such substitute to the contract surety.

On the other hand, the steel company had no contract rights against the retainage, or against the contract surety, or against the Highway Department. All such rights of the steel company arose under chapter 74 of the Acts of 1917 and under chapter 80 of the Acts of 1929 and were purely statutory. Properly speaking, these were not rights at all but were remedies afforded the materialman by these statutes to enable him to enforce his rights arising under his agreement with the general contractor.

In Southern Construction Co. v. Halliburton, 149 Tenn. 319, we noted that the statutes requiring contractors on public works to execute bonds for the protection of laborers and materialmen had the same general purpose as the mechanic's lien statutes. The beneficiaries of the legislation are given a lien under private contracts, recourse on the bond under public contracts.

Many cases hold that a mechanic's lien being only a remedy afforded by statute for the collection of a debt [fol. 11] arising out of contract, and not a vested right, may be abolished or modified by statute without impairing the obligation of the contract. Bangor v. Goding, 35 Me. 73, 56 Am. Dec. 688; Hanes v. Wadey, 73 Mich. 178, 2 L. R. A. 498; Bolton v. Johns, 5 Pa. St. 145, 47 Am. Dec. 404; Wilson v. Simon, 91 Md. 1, 80 Am. St. Rep. 427.

Other cases take the view that a mechanic lienor cannot be so divested by a repeal of the statute under which his lien accrued; that he has a vested interest in this remedy. Tell v. Woodruff, 45 Minn. 10; Streubel v. Milwaukee, etc. R. Co., 12 Wis. 71; Warren v. Woodard, 70 N. C. 382; Weaver v. Sells, 10 Kan. 619.

We have not undertaken above to cite all the cases on either side of this controverted question. This particular controversy has not arisen in this court and is not presented by the case before us.

If we concede that the materialman's lien in the one instance, or his recourse on the bond in the other instance, enters into his contract and is a part thereof, and that a remedy so embraced cannot be impaired without impairing the obligation of the contract, still our construction of chapter 80 of the Acts of 1929 does not bring that statute into [fol. 12] any constitutional difficulty. We construe the statute as regulating, after its passage, the procedure to be followed by all parties in respect to the final settlement of every highway contract, whether the contract itself was made before or after the enactment of chapter 80 of the Acts of 1929.

The original Act, chapter 74 of the Acts of 1917, as its title indicated, undertook "to confer upon the State Highway Department certain powers with respect to the distri-

bution and expenditure of said entire (highway) fund and to impose certain duties and place certain restrictions upon the said State Highway Department with respect thereto." The amendatory Act, chapter 80 of the Acts of 1929, further regulated the expenditure of the highway funds in settlement for completed projects when there were unpaid laborers and materialmen. Excepting one subsection dealing with the qualifications of a general contractor, every other substantial provision (eleven lettered subsections) of the Act of 1929 relates to procedure to be followed when a contract is finished and there are outstanding claims for labor and material. The procedure to be followed by the Commissioner, the contractor, and the claimants is detailed. The Act of 1917 left nearly all of this to implication.
[fol. 13] The Act of 1929 declared that its provisions should "take effect from and after its passage." That is, the procedure outlined should be thereafter followed. The Act dealt with procedure to be followed upon the completion of all highway contracts, irrespective of the date of any contract. Nothing to the contrary can be gathered from any portion of the amendatory statute.

Chapter 80 of the Acts of 1929 thus interpreted is retrospective only in the sense that it may be said to have altered the remedies previously existing for enforcing rights arising under earlier contracts. On its face the statute is retrospective to that extent.

It is the general rule that, where a statute deals with procedure only, it applies prima facie to rights of action that have accrued and indeed to pending actions. Lewis' Sutherland Statutory Construction, Second Edition, Vol. 2, p. 1226, 25 R. C. L. 791, 59 C. J. 1173.

The constitutional rights of one whose existing remedy is thus taken away are not infringed if the procedural statute provides him a new and effective remedy instead. This is true even though the new remedy is not so convenient.

In Collins v. East Tennessee, V. & G. R. Co., 56 Tenn. 841, the court said:

[fol. 14] "It is a general rule, that a Statute is to operate prospectively, unless upon its face it imports a retrospective operation; but it is not every retrospective law that is objectionable in a Constitutional sense. It is said that a vested right of action is property, just as tangible things are, and is protected from any arbitrary interference by the Legislature; but this doctrine is referable to such rights of action as spring from contracts or from the Common Law. Cooley, 362. But the right to a particular remedy, says the same authority, is not a vested right. Id., 361. The State has complete control over the remedies of its citizens in the Courts. It may give a new and additional remedy for a right already in existence—or may abolish old and substitute new remedies."

In Lunati v. Building & Loan Ass'n, 167 Tenn. 161, it was said:

"But the Constitution does not forbid a change in the remedy which does not deprive one of the contractual right nor prevent enforcement of the right. If the right to enforce is left effective, the Constitution is not violated. State v. Bank, 3 Baxt., 395. * * * While they (complainants) have a right to enforce their contract and that right cannot be impaired, they have no vested right in a particular remedy."

Other decisions of this court to like effect are reviewed [fol. 15] in the two opinions from which we have quoted.

The Supreme Court of the United States has announced the same rule. Tennessee v. Sneed, 96 U. S. 69; Fourth National Bank v. Francklyn, 120 U. S. 764.

By the Act of 1917 complainant steel company was given recourse on the retainage and on the contract bond to secure its rights arising under its engagement with the general contractor. For these remedies the Act of 1929 substituted recourse on an indemnity or refunding bond.

It seems to us the substitute remedy was adequate and effectual, as well as conventional. We suppose that statutes exist everywhere to permit the release of property taken under the levy of an execution or attachment upon the execution of a good bond by the property owner. We have not heard the validity of such statutes questioned. We see no impropriety therefore in a statute permitting the general contractor to secure the release of his retainage upon the execution of a good bond.

Likewise the substitution of the refunding or indemnity bond for the contract bond seems unobjectionable. In either case, the bond would have to be approved by the Highway Commission. The protection offered by one bond [fol. 16] would ordinarily be as good as the protection offered by the other. As a rule, bonds from surety companies are taken.

Owing to the economic stress of recent years, the surety company executing the contract bond and the surety company executing the refunding bond both became involved in financial difficulties. For that reason the complainant steel company is here seeking to hold both surety companies.

In our opinion, for the reasons heretofore stated, the surety on the contract bond has been discharged from liability and the decree of the Court of Appeals is accordingly affirmed.

Green, C. J.

Mr. Justice McKinney dissents.

[fol. 17] IN SUPREME COURT OF TENNESSEE

[File endorsement omitted]

[Title omitted]

DISSENTING OPINION—Filed April 6, 1935

I concur with the Chancellor and the Court of Appeals in holding that the Act of 1929 should be construed as prospective, otherwise it would be unconstitutional as impairing the obligation of a contract. Upon the strength of the bond executed by the National Surety Company complainant furnished steel of the value of $135,000. Under the majority opinion the legislature can destroy this obligation by authorizing the Commissioner of Highways to substitute other security, which, as in this cause, was worthless, and upon which complainant might not have been willing to furnish this large quantity of material. This, in my opinion, extends the rule of remedies further than is justified under elemental principles of contract. The National Surety Company, for a paid consideration, said to complainant if you will furnish this material we will guarantee that you will receive your money. Upon this agreement the Surety Company now says that it is released because, [fol. 18] without the knowledge or consent of complainant, another agency substituted other surety in its stead. Treating the Act of 1929 as prospective, it is valid, and those who contract subsequent to its enactment would be bound by its provisions. But to give it a retrospective application certainly causes complainant to lose a large sum of money which the National Surety Company guaranteed the payment of.

I, therefore, respectfully dissent from the majority opinion.

McKinney, J.

[fol. 19] IN SUPREME COURT OF TENNESSEE

Davidson Equity

Court of Appeals affirmed

INTERNATIONAL STEEL & IRON COMPANY

vs.

NATIONAL CONSTRUCTION CO. ET AL

DECREE—April 6, 1935

This cause coming on further to be heard upon a transcript of the record from the Chancery Court of Davidson County, petition for certiorari and reply thereto to the action of the Court of Appeals, briefs and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Court of Appeals there is no error.

It is therefore ordered and decreed by the Court that the decree of the Court of Appeals be in all things affirmed, and that the decree of the Chancelloe be reversed, and the bill dismissed as to the National Surety Co. and that the International Steel and Iron Co. principal and Louis Leftwich and Cecil Sims, sureties, will pay all of the costs of this cause, for which let fi fa issue.

[fol. 20] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION FOR APPEAL—Filed June 10, 1935

Now comes International Steel and Iron Company, appellant, and says that on April 6th, 1935, the Supreme Court of the State of Tennessee, it being the highest court of said state in which a decision could be had in said cause between the above named parties, rendered final judgment herein in favor of National Surety Company, one of the appellees, and against International Steel and Iron Company, appellant, in which final judgment in said cause certain errors were committed to the prejudice of International Steel and Iron Company, appellant, all of which will more in detail appear in the assignment of errors which is filed with this petition.

[fol. 21] That in the record and proceedings it will appear there was drawn into question the constitutional validity of a certain statute of the State of Tennessee, to-wit: Chapter 80 of the 1929 Public Acts of Tennessee, on the ground that said statute as interpreted and applied by the Supreme Court of Tennessee in this cause, released and extinguished the obligation of a preexisting contract between appellant and National Surety Company, appellee, and released and extinguished the means which at the time of the creation of said contract the law afforded for its enforcement; and said statute therefore was in violation of Section 10, Article 1, of the Constitution of the United States.

Wherefore International Steel and Iron Company, appellant, prays that upon the execution by it of a proper bond duly approved, appeal may be granted in its behalf in the said cause to the Supreme Court of the United States for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States at Washington.

This June 10th, 1935.

International Steel and Iron Company, F. M. Bass, Louis Leftwich, by Cecil Sims, Counsel.

[fol. 22] Appeal is hereby allowed, as prayed, upon the International Steel and Iron Company making bond as required by law in the sum of $1,000.00.

This June 10, 1935.

Grafton Green, Chief Justice of the Supreme Court of the State of Tennessee.

[fol. 23] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENTS OF ERROR ACCOMPANYING PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

International Steel and Iron Company, appellant in this cause, in connection with its petition for appeal this day filed, to-wit: June 10th, 1935, shows the following errors which it avers occurred in the proceedings in this cause and on the trial thereof, and in the opinion and judgment of the Supreme Court of the State of Tennessee, upon which it relies to reverse the final judgment entered herein as appears of record.

I

The Supreme Court of Tennessee erred in holding and decreeing that Chapter 80 of the 1929 Public Acts of Tennessee, as construed and applied in this cause, was valid and not in violation of the Constitution of the United States, said Act being invalid and in violation of Section 10, Article [fols. 24-51] 1, of the Constitution of the United States because:

(a) Said Act as construed by the Court and applied to appellant in this cause impaired the obligations of a preexisting contract between appellant and appellee in that it impaired, released and destroyed the means afforded by law for the enforcement of said contract at the time of its creation.

(b) Said Act as construed by the Court and applied to appellant in this cause impaired the obligations of a preexisting contract between appellant and appellee in that it impaired, released and discharged the obligations of said contract without the consent of appellant.

II

The Supreme Court of Tennessee erred in holding and decreeing that Chapter 80 of the 1929 Public Acts of Tennessee was applicable to the preexisting contract between appellant and appellee, and in failing and declining to hold said Act to be prospective and not retroactive.

For which errors the appellant, International Steel and *Ice* Company, prays that said final judgment in the Supreme Court of the State of Tennessee, dated April 6th, 1935, in the above cause be reversed, and that appellee, National Surety Company, be taxed with the costs.

This June 10th, 1935.

International Steel and Iron Company, F. M. Bass,
Louis Leftwich, by Cecil Sims, Counsel.

[fol. 52] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER ALLOWING APPEAL

This cause came on to be heard upon the petition of International Steel and Iron Company, appellant, in this cause, for an appeal to the end that said cause may be transferred, as provided by law, to the Supreme Court of the United States for final determination.

And it appearing to the Court that the International Steel and Iron Company has in proper manner challenged the constitutional validity of a certain statute of the State of Tennessee on the ground that it is repugnant to the Constitution of the United States, and this Court having held by opinion and order duly filed in this cause that said statute is valid and enforcible and applicable to said appellant in this cause, and International Steel and Iron Company [fol. 53] having filed an appeal bond in the sum of One Thousand Dollars, satisfactory to the Chief Justice of this Court.

It is, therefore, ordered, adjudged and decreed that an appeal as prayed be, and the same hereby is, allowed to the Supreme Court of the United States.

It is further ordered that a transcript of the record, proceedings, papers, opinion and judgment of this Court shall be prepared and transmitted by the Clerk of the Supreme Court of Tennessee to the Supreme Court of the United States at Washington, in the manner and form provided by law, so that he shall have the same in said Court within forty days of this date, to the end that said Court may inspect the same and do what according to law should be done.

This the 10 day of June, 1935.

Grafton Green, Chief Justice of the Supreme Court
of the State of Tennessee.

[fols. 54-58] Bond on Appeal for $1,000.00 approved June 10, 1935, omitted in printing.

[fol. 59] Citation in usual form showing service on Wm. Hume omitted in printing.

[fol. 60] [Caption omitted]

[fol. 61] IN CHANCERY COURT OF DAVIDSON COUNTY

No. 42476

INTERNATIONAL STEEL & IRON COMPANY, a Corporation Organized under the Laws of the State of Indiana, and a Resident of said State, Complainant,

vs.

NATIONAL CONSTRUCTION COMPANY, a Corporation, Organized under the Laws of the State of Florida, and a Nonresident of Tennessee; National Surety Company, a Corporation Organized under the Laws of a Foreign State but Having an Office and Agent in Davidson County, Tennessee; R. H. Baker, Commissioner of Highways & Public Works of the State of Tennessee, a Resident of Davidson County, Tennessee, Equitable Casualty & Surety Company, a Corporation Organized under the Laws of the State of New York and Having a Resident Agent in Davidson County, Tennessee, Defendants

ORIGINAL BILL—Filed September 12, 1930

To the Honorable James B. Newman, Chancellor, Holding Part Two of the Chancery Court of the Seventh Division of the State of Tennessee at Nashville:

Your complainant respectfully shows to the Court as follows:

I

The International Steel & Iron Company is a corporation duly organized under the laws of the State of Indiana, with its principal office and place of business in Evansville [fol. 62] in said State of Indiana, and has heretofore filed its charter for domestication in the State of Tennessee and has been duly authorized and licensed to do business in said State.

The defendant National Construction Company is a corporation organized under the laws of the State of Florida and has its principal office at Miami in said State of Florida, and has heretofore filed its charter and has been duly domesticated and licensed to do business in Tennessee.

The defendant National Surety Company is a corporation organized under the laws of the State of New York, according to complainant's information, but at all events is a foreign corporation but has been domesticated and licensed to do business in Tennessee and has a resident agent in Davidson County, Tennessee.

Defendant R. H. Baker is the duly appointed and acting Commissioner of Highways & Public Works of the State of Tennessee, and is a citizen and resident of Davidson County, Tennessee.

Defendant Equitable Casualty & Surety Company is a corporation organized under the laws of the State of New York and has duly filed its charter and been domesticated and qualified to do business in the State of Tennessee, and has a resident agent in Davidson County, Tennessee.

[fol. 63] II

On March 12, 1928, defendant National Construction Company entered into a contract with the State of Tennessee, through its Department of Highways & Public Works, for the construction of a certain bridge across the Tennessee River, known as the Perryville Bridge, and more particularly as Special Bridge Project No. 4, Section 8, Decatur and Perry Counties of State Highway No. 23, as per plans and specifications covering this work as prepared by the State of Tennessee, Department of Highways and Public Works, and as provided by law the said National Construction Company entered into a certain bond, also dated March 12, 1928, binding itself unto the State of Tennessee and its Department of Highways & Public Works in the penal sum of Two hundred Eighty-Five Thousand Nine Hundred Seventy-Six Dollars and Twenty Cents ($285,976.20), guaranteeing the performance of said contract, which bond was duly executed by the defendant National Surety Company as surety thereon, and by express terms the said National Construction Company and its said surety, National Surety Company, guaranteed the payment on the part of the principal contractor for all materials, supplies and labor furnished and used in the construction of said bridge, said bond having been made pursuant to the statutes of the State of Tennessee and being expressly for the benefit of such parties as furnished materials, sup- [fol. 64] plies and labor to said contractor in the construction of said bridge. The original of said contract between the State of Tennessee and the defendant National Construction Company for the construction of said bridge and the original of said bond are now in the hands of the defendant R. H. Baker, Commissioner of Highways & Public Works of the State of Tennessee, and also copy is in possession of the defendants National Construction Company and National Surety Company and hence an original can not be filed by complainant but true copies thereof will be procured before the hearing and complainant calls upon the defendants to produce the originals.

III

Shortly thereafter and on or about March 22, 1928, complainant entered into a contract under the terms and provisions of which it agreed to furnish to the said principal contractor, to wit, National Construction Company, certain structural and cast steel, including sheet lead and structural steel spans for the bridge in question, for which the said defendant National Construction Company agreed to pay your complainant the total sum of One Hundred Thirty-five Thousand Thirty Dollars and Fifty-three Cents ($135,-020.53), said original contract, if required, will be produced [fol. 65] on or before the hearing. Complainant shows that pursuant to the terms and provisions of said contract it duly fabricated, delivered and furnished to said defendant the said structural and cast steel and sheet lead, all of which were in fact used in the construction of said bridge, and complainant completed and erected the said steel spans out of the materials aforesaid in accordance with its contract aforesaid, for which complainant was paid from time to time certain sums aggregating a total credit of Seventy-five Thousand One Hundred Eighty-six Dollars and Eighty-two Cents, ($75,186.82), leaving a balance due and unpaid on its said contract in the sum of Fifty-Nine Thousand Eight Hundred Thirty-three Dollars and Seventy-one Cents

($59,833.71) which amount is now just, due and owing to your complainant and there are no offsets or counterclaims against the same. Complainant files herewith an itemized statement of said account showing all credits thereon, leaving the balance aforesaid, said statement being made Exhibit "A" hereto.

Complainant has made demand upon the defendants National Construction Company and National Surety Company for the payment of the sums due it as aforesaid but said defendants have failed, refused and neglected to make payment thereof or any part thereof, and same is now past due and unpaid, and complainant is entitled to interest thereon from and after the date of the completion of said [fol. 66] work.

IV

On the completion of said work by said contractor, the Commissioner of Highways & Public Works, according to law, advertised for claimants to file their claims against said contractor, which advertisement was published in Parsons' News Leader, published at Parsons in Decatur County, Tennessee, and also in the Perry Countian, published at Linden in Perry County, Tennessee, the last publication of which was made on August 20, 1930, and complainant duly filed its claim for the amount hereinabove shown to be due to it, with the proper number of copies of said claim as required by law, and with good and lawful bond as provided by law, with the Department of Highways & Public Works of the State of Tennessee.

Complainant alleges that on the day set for final settlement the said Department of Highways & Public Works had retained from the funds due the said principal contractor the sum of Seventy-seven Thousand Sixty-nine Dollars and Eighty-two Cents ($77,069.82), and on September 3, 1930, the defendant National Construction Company executed to the Department of Highways & Public Works of the State of Tennessee a refunding bond, as pro- [fol. 67] vided by law, with the defendant Equitable Casualty & Surety Company as surety thereon in the penal sum of the amount of said retainage hereinabove mentioned, whereupon the said Department of Highways & Public Works paid over said retained funds to the principal contractor and now holds said refunding bond for the benefit of claimants who had filed their claims with said Department of Highways & Public Works.

Complainant, therefore, pursuant to the statutes of the State of Tennessee, brings this suit, and, premises considered, prays:

1st. That the defendant be made such by issuance and service of process on the defendant as provided by law, requiring them to appear and answer this bill at an early rule day of the Court but their oaths to their answers are waived.

2nd. That on the hearing complainant have a decree against the defendants National Construction Company, National Surety Company, and Equitable Casualty & Surety Company for the full amount herein sued on, to wit, $59,833.71, with lawful interest thereon as may be right and proper and for the costs of this cause.

3rd. That complainant have such other, further and general relief as it may be entitled to under the equities of the [fol. 68] cause.

Paul L. Williams, Louis Leftwich, Bass, Berry & Sims, Solicitors for Complainant.

We are sureties for the costs:

Louis Leftwich, Cecil Sims.

[fol. 69] EXHIBIT "A" TO ORIGINAL BILL

(Statement)

Evansville, Indiana, 7-31-30.

International Steel & Iron Co.

National Construction Company—

1928.			
Aug. 22	Ladder rungs, etc.	$49.00	
1929.			
Nov. 1	Plates & Bolts	41.54	
Dec. 18	" "	10.37	
1930.			
July 23	Bridge	$134,919.62	
			$135,020.53
1929.	Credit:		
May 23	Cash	648.58	
May 31	Cash	236.87	
July 11	Cash	169.98	

($59,833.71) which amount is now just, due and owing to your complainant and there are no offsets or counterclaims against the same. Complainant files herewith an itemized statement of said account showing all credits thereon, leaving the balance aforesaid, said statement being made Exhibit "A" hereto.

Complainant has made demand upon the defendants National Construction Company and National Surety Company for the payment of the sums due it as aforesaid but said defendants have failed, refused and neglected to make payment thereof or any part thereof, and same is now past due and unpaid, and complainant is entitled to interest thereon from and after the date of the completion of said [fol. 66] work.

IV

On the completion of said work by said contractor, the Commissioner of Highways & Public Works, according to law, advertised for claimants to file their claims against said contractor, which advertisement was published in Parsons' News Leader, published at Parsons in Decatur County, Tennessee, and also in the Perry Countian, published at Linden in Perry County, Tennessee, the last publication of which was made on August 20, 1930, and complainant duly filed its claim for the amount hereinabove shown to be due to it, with the proper number of copies of said claim as required by law, and with good and lawful bond as provided by law, with the Department of Highways & Public Works of the State of Tennessee.

Complainant alleges that on the day set for final settlement the said Department of Highways & Public Works had retained from the funds due the said principal contractor the sum of Seventy-seven Thousand Sixty-nine Dollars and Eighty-two Cents ($77,069.82), and on September 3, 1930, the defendant National Construction Company executed to the Department of Highways & Public Works of the State of Tennessee a refunding bond, as pro- [fol. 67] vided by law, with the defendant Equitable Casualty & Surety Company as surety thereon in the penal sum of the amount of said retainage hereinabove mentioned, whereupon the said Department of Highways & Public Works paid over said retained funds to the principal contractor and now holds said refunding bond for the benefit of claimants who had filed their claims with said Department of Highways & Public Works.

Complainant, therefore, pursuant to the statutes of the State of Tennessee, brings this suit, and, premises considered, prays:

1st. That the defendant be made such by issuance and service of process on the defendant as provided by law, requiring them to appear and answer this bill at an early rule day of the Court but their oaths to their answers are waived.

2nd. That on the hearing complainant have a decree against the defendants National Construction Company, National Surety Company, and Equitable Casualty & Surety Company for the full amount herein sued on, to wit, $59,833.71, with lawful interest thereon as may be right and proper and for the costs of this cause.

3rd. That complainant have such other, further and general relief as it may be entitled to under the equities of the [fol. 68] cause.

Paul L. Williams, Louis Leftwich, Bass, Berry & Sims, Solicitors for Complainant.

We are sureties for the costs:

Louis Leftwich, Cecil Sims.

[fol. 69] EXHIBIT "A" TO ORIGINAL BILL

(Statement)

Evansville, Indiana, 7-31-30.

International Steel & Iron Co.

National Construction Company—

1928.			
Aug. 22	Ladder rungs, etc.	$49.00	
1929.			
Nov. 1	Plates & Bolts	41.54	
Dec. 18	" "	10.37	
1930.			
July 23	Bridge	$134,919.62	
			$135,020.53
1929.	Credit:		
May 23	Cash	648.58	
May 31	Cash	236.87	
July 11	Cash	169.98	

National Construction Company—Continued.

1929.		Credit:		
Aug.	12	Cash	191.23	
Sept.	20	Contra. Naill & Naill	22.00	
Aug.	9	“ “ “	427.35	
“	9	“ “ “	6.50	
Nov.	11	“ “ “	16.50	
Nov.	15	“ “ “	71.27	
“	9	“ “ “	27.58	
“	8	“ “ “	26.62	
“	7	“ “ “	23.20	
Dec.	7	“ “ “	4.95	
Oct.	15	“ “ “	119.37	
Dec.	27	“ “ “	2.97	
Nov.	19	Cash	28,503.94	
1930.				
Jan.	11	Contra. Naill & Naill	110.00	
Feb.	7	“ “ “	75.00	
Mar.	22	“ “ “	4.41	
“	21	“ “ “	5.04	
June	26	“ “ “	14.43	
“	30	“ “ “	10.00	
Mar.	22	Cash	44,469.03	
				75,186.82
		Balance		$59,833.71

[fol. 70] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

PETITION OF R. H. BAKER, COMMISSIONER, ETC.—Filed October 4, 1930

Your petitioner, R. H. Baker, duly qualified, appointed and acting Commissioner of the Department of Highways and Public Works of the State of Tennessee, represent to the Court that the National Construction Company was the principal contractor for the construction of State aid bridge, highway and approaches, Project No. SBP #4-A in Perry and Decatur Counties, Tennessee;

Your petitioner further shows to the Court that final settlement was made with said contractor on September 4, 1930; that under Chapter 74, of the Acts of 1917, and Acts amendatory thereto, in making said final settlement with said contractor, a refunding bond was by them executed covering the amount of all claims filed with the Department of Highways and Public Works of the State of Tennessee against said project, including the claim upon which this suit was brought; certified copy of said Refunding Bond is [fol. 71] hereto attached, made a part of this petition and marked Exhibit "A".

Your petitioner further shows to the Court that claimant, International Steel & Iron Company, filed with the Department of Highways and Public Works of the State of Tennessee, a claim in the amount of $59,833.71, for materials, supplies and labor furnished and used in the construction of the bridge over the Tennessee River, known as the Perryville Bridge on S. B. P. #4-A; certified copy of said claim is hereto attached, made a part of this petition and marked as Exhibit "B"; a claimant's bond covering said claim was also filed with the Department of Highways and Public Works of the State of Tennessee, as required by law, certified copy of which is hereto attached, made a part of this petition and marked Exhibit "C".

Now having fully answered as required by Chapter 80, Public Acts of 1929, your petitioner R. H. Baker, Commissioner of the Department of Highways and Public Works of the State of Tennessee, prays that this suit be dismissed as to him.

R. H. Baker, Commissioner of the Department of Highways and Public Works of the State of Tennessee. L. D. Smith, Attorney General. Jno. L. Neely, Assistant Attorney-General.

[fol. 72] EXHIBIT "A" TO PETITION OF R. H. BAKER, COMMISSIONER—Filed October 4, 1930

Refunding Bond

We, National Construction Company, as Principal, and Equitable Casualty & Surety Company, as Surety, acknowledge ourselves indebted and firmly bound unto the State of Tennessee, ~~in~~ the sum of $77,099.32, Seventy-Seven Thousand and Ninety-Nine and 32/100, Dollars.

The condition of the above obligation is such that:

Whereas, the Department of Highways and Public Works of the State of Tennessee, hereinafter called the "Department" has this day made final settlement with the National Construction Company contractor on Project No. S. B. P. 4, —being the construction of a steel and concrete bridge over Tennessee River known as "Perryville Bridge" hereinafter called the contractor, by paying said contractor $77,-099.32, Seventy-Seven Thousand Ninety-Nine and 32/100, the amount of the final retainage heretofore withheld, and

Whereas, there has been filed with said Department the following listed claims against said contractor on said project, to wit:

[fol. 73] Longstaff Orm Lumber Company	$ 2,188.52
C. A. Livingstone	90.00
Tennessee Mill & Mine Supply Company	499.92
Henry A. Petter Supply Co.	2,624.92
Chicago Pneumatic Tool Co.	688.22
Manhattan Rubber Mfg. Co.	94.40
George A. McDonald	1,136.87
J. E. Reynolds	375.00
Hassell Lumber Company	2,733.65
W. R. Dennison	243.80
C. G. Kershaw Contracting Company	300.00
Williams & Guinn	73.50
International Steel & Iron Co.	59,833.71
Day-Evans Iron Works, Inc.	110.16
Hermitage Portland Cement Co.	242.80
J. K. Martin	105.00
Standard Oil Co. of La.	704.08
J. O. Ashman	223.00
Sverre Olsen	1,242.85

Now, therefore, if the said National Construction Company shall pay such of the above listed claims as may be adjudicated just, proper and legal claims against it on said Project, or failing to pay such claims, shall refund to the State of Tennessee the $77,099.32 this day paid it with in-
[fol. 74] terest, then this obligation to be void, otherwise, to remain in full force and effect.

This obligation is executed under the provision of Chapter 80, Acts of 1929, and upon full understanding by all parties that it stands in place and in lieu of said $77,099.32, the retainage this day paid the contractor; that it is executed to protect said Department and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the contractor on said Project, as fully as if the retainage had not been paid to the contractor but had been withheld by the Department, and said claimants or any of them, in the event their claims are adjudicated just, proper and legal claims against said Project, are authorized by all parties hereto to bring suit on this bond, provided, the liability of the surety hereto shall not exceed $77,099.32, the amount of the retainage this day paid to the contractor, together with such interest and cost as the Court may allow.

This the 3rd day of September, 1930.

National Construction Company, by John A. McDonald, President, Principal. Equitable Casualty & Surety Company, Surety, by Howard Dye, Attorney-in-fact.

[fol. 75] EXHIBIT "B" TO PETITION OF R. H. BAKER, ETC.—Filed Oct. 4, 1930.

Evansville, Indiana, 7-31-30.

International Steel & Iron Co.

National Construction Co.—

1928.			
Aug. 22	Ladder rungs, etc.	$49.00	
1929.			
Nov. 1	Plates & Bolts	41.54	
Dec. 18	" "	10.37	
1930.			
July 23	Bridge	$134,919.62	
			$135,020.53
1929.	Credit:		
May 23	Cash	648.58	
May 31	Cash	236.87	
July 11	Cash	169.98	
Aug. 12	Cash	191.23	
Sept. 20	Contra. Naill & Naill	22.00	
Aug. 9	" " "	427.35	
" 9	" " "	6.50	
Nov. 11	" " "	16.50	
Nov. 15	" " "	71.27	
" 9	" " "	27.58	
" 8	" " "	26.62	
" 7	" " "	23.20	
Dec. 7	" " "	4.95	
Oct. 15	" " "	119.37	
Dec. 27	" " "	2.97	
Nov. 19	Cash	28,503.94	
1930.			
Jan. 11	Contra. Naill & Naill	110.00	
Feb. 7	" " "	75.00	
Mar. 22	" " "	4.41	
" 21	" " "	5.04	
June 25	" " "	14.43	
" 30	" " "	10.00	
Mar. 22	Cash	44,469.03	
			75,186.82
	Balance		$59,833.71

[fol. 76] International Steel & Iron Company

Evansville, Ind., 7-23-30.

Sold to National Construction Company, Inc., 812-814 Barnett National Bank Building.

Address: Jacksonville, Florida.
Address: Perryville, Tennessee.
Via Freight and Barge.
Our Order No. 2-1933.
Date Entered: 3-22-28.
Date of Buyer's Order: 3-19-28.
Terms: See below.

Furnish, fabricate, deliver, erect and paint approximately 1,974,500# of Structural and Cast Steel, including Sheet Lead, for structural steel spans for a bridge across the Tennessee River, known as the Perryville Bridge or more particularly as Special Bridge Project No. 4, Decatur and Perry Counties on State Highway No. 23, as per plans and specifications covering this work as prepared by the State of Tennessee, Department of Highways and Public Works, it being understood that we be given adequate storage and working space gratis.

For the sum of —— 30819# @ $0.064 per lb. net $1,972.42
(six and four-tenth cents per pound, net)
Furnish approximately 29,347# of Expansion Devices for concrete approach, including Copper Plates,
For the sum of —— 2,077,300# @ $0.064 per lb. 132,947.20

(six and four-tenths cents per pound, net) net, freight allowed to Perryville, Tennessee railroad station $135,919.62

[fol. 77] No curb bars, Cast Iron Drains or Reinforcing included.

Completion—It is understood that we will be notified twenty days prior to the time to begin the erection of the Structural Steel and Steel Castings for the structural steel spans and will complete the erection within one hundred and fifteen (115) working days, it being understood that the construction of the superstructure is ready for us to go ahead with the erection without interruption, and when local conditions are favorable for such erection.

Shipment—It is understood that we will make shipment of material for Expansion Devices upon thirty days' notice.

Terms of Payment—It is understood the terms of payment between you and the State of Tennessee shall govern, except that the dates of payment named shall be extended for ten days.

International Steel & Iron Company

Evansville, Indiana, 8-22-28.

Sold to National Construction Company, Inc.
Address: Perryville, Tennessee.
Ship to: Same.
Address: Perryville, Tennessee.
Via: Freight.
[fol. 78] Our Order No. 2-2818.
Date Entered: 8-8-28.
Date of Buyer's Order: 8-3-28.
Buyer's Order No. 1791.
Terms: Net Cash 30 days.

Re: Perryville Bridge

Tenn. S. B. P. No. 4

Furnish according to our special drawing #38230:

67 Ladder rungs made of 1" diameter round rods.
2 Hand grips made of 1" diameter plain round rods.

These to be hot galvanized in accordance with standard specifications. These rungs will be bent in accordance with our drawing.

For the sum of $49.00

Net. Present rate of freight allowed to Perryville, Tennessee, railroad station.

[fol. 79] International Steel & Iron Company

Evansville, Ind. 12-18-29.

Sold to National Construction Company, Inc., 812-814 Barnett National Bank Building.
Address: Jacksonville, Florida.
Ship to Same.
Address: Perryville, Tennessee.
Via Freight, Prepaid.
Our order No. 2-5879.
Date entered: 12-19-29.
Date of Buyer's Order, 12-17-29.
Terms: Net Cash, 30 days.

Furnish for Perryville, Tennessee Bridge Job:

1—15 x ½″	Steel Expansion Plate	1′ 6″ long.
2—	ditto	1′ 2″ "
3—	"	0′ 10″ "

Above plates to be punched with countersunk holes. No Copper plates or bolts included.

For the sum of —— 162# @ $.064 per pound ..... $10.37 Net. Present rate of freight prepaid to Perryville, Tennessee Railroad Station.

[fol. 80] International Steel & Iron Company

Evansville, Ind., 11-1-29.

Sold to National Construction Co., Inc.
Address: Perryville, Tennessee.
Ship to Same.
Address: Perryville, Tennessee.
Via Freight.
Our order No. 2-5654.
Date entered: 10-28-29.
Date of Buyer's Order, 10-25-29.
Buyer's Order No. 68-G.
Terms: Net Cash, 30 days.

Furnish the following Plates and Bolts for Perryville Bridge Job:

4—10 x 15″	Steel Plates,
9—14 x 15″	do

2—18 x 15″ "
4—10 x 15″ Copper Plates,
2—14 x 15″ do
3—18 x 15″ "
100—¾ x 12″ Countersunk Bolts
649# @ 0.064 per lb. Net, freight allowed Perryville, Tennessee $41.54

State of Tennessee,
County of Davidson:

William J. Walker, being first duly sworn, upon his oath says, that he is Treasurer of the International Steel & Iron [fol. 81] Company, an Indiana Corporation, and makes this affidavit for and on behalf of said corporation; that the National Construction Company, of Atlanta, Ga., is justly and truly indebted to the International Steel & Iron Company in the sum of Fifty-Nine Thousand, Eight Hundred Thirty-Three Dollars and Seventy-One Cents ($59,833.71) a statement of which account, showing all debits and credits is hereto attached, made a part hereof, and marked Exhibit "A"; that no part of said account has been paid except as shown by the credits indicated; that said account is justly due and unpaid, and that no part thereof is for usurious interest; that all of said materials were furnished to the said National Construction Company of Atlanta, Georgia, but shipped to and used in Project SBP No. 4, Section 8 in Perry and Decatur Counties, in the State of Tennessee.

Dated at Nashville, Tennessee, this the 9th day of August, 1930.

William J. Walker.

Subscribed and sworn to before me, this 9th day of August 1930. Paul L. Williams, Notary Public. (Seal.)

[fol. 82] Exhibit "C" to Petition of R. H. Baker, Commissioner, etc.—Filed October 4, 1930.

Claimant's Bond

State of Tennessee,
County of Davidson:

Know all men by these presents, That the International Steel & Iron Company, of the State of Indiana, a corporation, as principal, and the United States Fidelity & Guaranty Company, as surety, are hereby held and firmly bound unto the State of Tennessee, for the use and benefit of the contractors herein named in the penal sum of Fifty-Nine Thousand Eight Hundred Thirty-Three Dollars and Seventy-One Cents ($59,833.71) for the payment of which well and truly to be made, we do hereby bind ourselves, assigns and personal representatives, but the condition of this bond is:

That the said International Steel & Iron Company has this day filed with the Department of Highway and Public Works of the State of Tennessee, under the provisions of Chapter 80 of the Public Acts of 1929, amending Chapter 4 of the Public Acts of 1917, the claim against the National Construction Company of Atlanta, Georgia, in the sum of Fifty-Nine Thousand Eight Hundred Thirty-Three Dollars and Seventy-one Cents ($59,833.71) for labor and material furnished said contractor while engaged in per- [fol. 83] forming a contract upon special bridge project No. 4, Section 8.

Now, therefore, provided that the said International Steel & Iron Company shall faithfully prosecute said claim and on failing to do so, shall pay the amount of any judgment and court costs awarded against it by the reason of the filing and the prosecution of the claim, not exceeding thirty (30) per cent of the amount thereof, then this obligation to be null and void, but otherwise to remain in full force and effect.

This the 19th day of August, 1930.

International Steel & Iron Company, by William J. Walker, Treasurer, Principal. United States Fidelity & Guaranty Co., by H. Phelps Smith, Surety, Attorney-in-fact.

[fol. 84] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER AND CROSS-BILL OF THE NATIONAL CONSTRUCTION COMPANY—Filed May 19, 1931

For answer to the bill filed against it and others in the above-styled cause this defendant says:

I

That it is not informed concerning the allegations as to the organization and domesticating of the complainant, but insofar as the same may be material to the rights of this defendant it demands strict proof thereof.

[fol. 85]

II

The facts alleged in paragraph one of the bill concerning this defendant's organization and domestication are correctly stated.

III

Defendant admits that on or about March 12, 1928, it entered into a contract with the State of Tennessee through its Department of Highways and Public Works and that the terms of such contract were substantially as set forth in complainant's bill. This defendant will file on or before the hearing properly authenticated copy of such contract if called on so to do. Defendant likewise admits that it executed a bond to the State of Tennessee in the penal sum of two hundred eighty-five thousand nine hundred seventy-six dollars and twenty cents ($285,976.20), with the defendant National Surety Company as its surety thereon, guaranteeing performance of said contract, but defendant does not admit that complainant correctly set forth the terms and provisions of said bond and will file properly authenticated copy thereof on or before the hearing if called on so to do.

[fol. 86]

IV

Defendant admits that on or about March 22nd, 1928, it entered into a contract with complainant by which complainant agreed to furnish, fabricate, deliver on the bridge site, erect, and paint approximately 1,974,500 pounds of structural and cast steel, including sheet lead and structural steel spans for said bridge, as per plans and specification covering the work prepared by the State of Tennessee Department of Highways and Public Works. Said contract further provided that complainant after receiving twenty days prior notice of the time to begin the erection of said structural steel, steel castings, etc., would immediately begin said erection and would complete the same within 115 working days. Copy of said contract is herewith filed as Exhibit "A" hereto and made a part hereof but the same need not be copied.

Defendant denies that complainant pursuant to the terms and provisions of said contract duly fabricated, delivered and furnished to this defendant said structural steel, cast steel and sheet lead, and denies that complainant completed and erected said steel spans according to the terms of said contract. Instead of completing the steel work within the time required by the contract, such time was exceeded by more than ten months. Defendants admits that from time [fol. 87] to time during the progress of the work it paid the complainant certain sums of the contract price, but did so with the distinct understanding between it and complainant that it was not waiving the terms of the contract and that it was intending to hold complainant responsible to it for all the damages which defendant might suffer by reason of complainant's delay in carrying on the work. It denies that there is a balance of fifty-nine thousand eight hundred thirty-three dollars and seventy-one cents ($59,833.71), or any sum whatever due from it to complainant. It will show on the hearing that the damages suffered by it on account of complainant's failure to perform its contract and erect the steel within the time provided by the contract was greatly in excess of the amount claimed by complainant against this defendant.

V

Defendant neither admits nor denies the allegations that complainant duly filed its claim with the Department of Highways and Public Works as required by law, and demands strict proof thereof.

Defendant admits that on the day set for final settlement the Department of Highways and Public Works had retained from the funds due defendant the sum of seventy- [fol. 88] seven thousand sixty-nine dollars and eighty-two cents ($77,069.82), and that upon execution of a refunding bond as provided by law in the penal sum of the amount of said retainage, which bond the Equitable Casualty and Surety Company, a defendant herein, signed as surety, said retainage was paid over to the defendant by the Department of Highways and Public Works.

VI

Defendant further says that at the time of the making of said contract and prior thereto and until after the filing of this suit, complainant was not authorized to do business in Tennessee, having to the present time failed, neglected and refused to pay the privilege tax required of it by law, which failure is specially pleaded and relied upon in bar of complainant's right to maintain this suit.

All allegations contained in said bill not already specifically denied are here and now generaly denied, and denied as fully as though separately and specifically denied.

And now, having fully answered said bill, this defendant prays to be hence dismissed with its reasonable costs.

[fol. 89]

Cross-Bill

And now, being advised that on the facts hereinbefore alleged and hereafter to be alleged, this defendant is entitled to relief, it assumes the character of cross-complainant and says:

Cross-complainant, for the purpose of performing its contract with the State of Tennessee to erect said bridge, was required to keep and did keep a large organization, employing many laborers, workmen, clerks, superintendents, and executives, and a large amount of machinery, tools, equipment and supplies. Cross-complainant was required to keep such organization, machinery, equipment, and supplies on hand at heavy expense during the progress of the work in building said bridge. Cross-complainant was also under the necessity of paying large sums for maintenance of said organization, machinery, and equipment, for insurance thereon, for interest on its invested capital in said organization, machinery, equipment, and supplies, for workmen's compensation insurance, and for surety bond premiums during the period of said work. All these items of expenditures were large and accrued during the period of about ten months' delay resulting from the breach of its contract by cross-defendant, International Steel & Iron [fol. 90] Company. During said ten months' delay occasioned by said breach of said contract by cross-defendant, cross-complainant was of necessity prevented from receiving its compensation from the State of Tennessee for the erection of said bridge and the interest on the amounts of money which cross-complainant was thus delayed in receiving from the said wrongful acts and breach of its contract by cross-defendant amounts to large sums of money. During said period of delay cross-complainant was also required to pay rent on barges and boats, maintain camp sites, pay traveling expenses for its officers and executives. All of said expenses, losses, and damages so resulting to cross-complainant as a consequence of the breach by cross-defendant of its said contract amounted to far more than the amount sought by complainant's bill. Itemized and detailed statements of said expenses, losses and damages will be fully shown and set forth at the hearing.

Premises Considered, Cross-Complainant Prays:

1. That this answer may be filed, deemed and treated as a cross-bill, and that subpoena to answer and copy thereof be served upon the International Steel & Iron Company, complainant in the original bill and cross-defendant herein, [fol. 91] to compel it to answer this cross-bill, but oath to its answer is waived.

2. That on the hearing cross-complainant be granted a recovery against said International Steel & Iron Company, for the expenses, losses and damages resulting to cross-complainant by reason of the wrongful breach by cross-defendant of its said contract, and that an accounting be had between cross-complainant and cross-defendant to show and ascertain all such expenses, losses, and damages, and to this end grant that all references to the Master may be had.

3. That cross-complainant have such other, further, and general relief as it may be entitled to upon the hearing.

National Construction Company, by Albert Williams,
Solicitor.

We are sureties for the costs incident to filing this cross-bill.

Albert Williams, S. L. Felts.

[fol. 92] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER OF NATIONAL SURETY COMPANY—Filed October 29, 1931

The defendant, National Surety Company, for separate answer to the Bill of Complaint filed against it and others in the above entitled cause, says:

It is admitted that on March 12, 1928, the defendant, National Construction Company, entered into a contract with the State of Tennessee, through its Department of Highways and Public Works, for the construction of the Perryville Bridge, as per plans and specifications covering this work as prepared by the State of Tennessee, Department of Highways and Public Works, and as provided by law the said National Construction Company entered into a bond, also dated March 12th, 1928, conditioned as required by law in such cases, in the penalty of $285,976.20, executed by this defendant as surety thereon. The contract between the National Construction Company and the Department of Highways and Public Works of the State of Tennessee, [fol. 93] and the bond executed in connection therewith, are referred to for a full and proper understanding of their terms and provisions.

It is admitted that on or about March 22nd, 1928, the complainant entered into a written contract with the National Construction Company to furnish certain structural and cast steel, including sheet lead and structural steel spans for said Perryville Bridge. This defendant is informed that the complainant duly fabricated, delivered and furnished to said defendant the structural and cast steel and sheet lead, all of which were used in the construction of said bridge.

This defendant is informed that the National Construction Company insists that it is not indebted to the complainant in the sum of $59,833.71 or in any other amount.

On September 3rd, 1930, the Department of Highways and Public Works of the State of Tennessee held as final retainage on the project aforesaid the sum of $77,099.32, which was in excess of the amount required to pay in full all claims that were filed, so that all of said claims were fully protected.

On said September 3rd, 1930, the Department of Highways and Public Works of the State of Tennessee, released said $77,099.32 to the National Construction Company, and accepted a refunding bond conditioned as follows:

[fol. 94] * * * if the said National Construction Company shall pay such of the above listed claims (including the claim of complainant) as may be adjudicated just, proper and legal claims against it on said Project, or failing to pay such claims, shall refund to the State of Tennessee the $77,099.32 this day paid it with interest, then this obligation to be void, otherwise, to remain in full force and effect." * * * that it is executed to protect said Department and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the contractor on said Project, as fully as if the retainage had not been paid to the contractor, but had been withheld by the Department, and said claimants or any of them, in the event their claims are adjudicated just, proper, and legal claims against said Project, are authorized by all parties hereto to bring suit on this bond, provided, the liability of the surety shall not exceed $77,099.32, the amount of the retainage this day paid to the contractor, together with such interest and cost as the Court may allow."

[fol. 95] It is insisted that the release of said retainage and the aceptance of said Refunding bond necessarily released and relieved this defendant of any liability to the Department of Highways and Public Works of the State of Tennessee, for any and all claims set forth in said Refunding Bond, one of which was the claim of the complainant. It is further insisted that the release of said retainage and the acceptance of said Refunding Bond necessarily released and relieved this defendant of any and all liability to each and every claimant included in said Refunding Bond, one of which was the complainant herein.

All averments of the bill not hereinbefore expressly admitted or denied, are here and now generally denied, and denied as fully as if separately and specifically denied.

And now, having answered, this defendant prays to be dismissed.

Hume & Armistead, Solicitors for National Surety Company.

[fol. 96] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER OF INTERNATIONAL STEEL & IRON CO. TO CROSS-BILL OF NATIONAL CONSTRUCTION COMPANY—Filed July 6, 1931

Comes the cross-defendant, International Steel & Iron Company, and for answer to the cross-bill filed in this cause against it by National Construction Company, says:

Cross-defendant denies that it breached its contract, as alleged in the cross-bill, and avers that it faithfully and punctually performed its contract in strict accordance with the terms and provisions thereof, all of which is set out in more particular detail in the original bill, and the cross-defendant refers to same and adopts the allegations of said original bill as a part of its answer to the cross-bill.

[fol. 97] Cross-defendant denies that the cross-complainant was under the necessity of paying large sums for maintenance of organization, machinery and equipment, for insurance thereon, for interest on its invested capital in said organization, machinery, equipment and supplies, for workmen's compensation insurance, and for surety bond premiums during the period of said work, for a period of about ten months on account of any breach or delay on the part of the cross defendant. Cross defendant denies that the cross complainant was prevented from receiving its compensation from the State of Tennessee on account of any negligence or breach of cross-defendant in the performance of its contract, and denies that cross-complainant lost the interest on the amounts of money due it by the State of Tennessee by reason of any negligence or breach of contract by this cross-defendant.

Cross-defendant denies that cross-complainant was required to pay rent on barges and boats, maintain camp sites and pay traveling expenses for its officers and executives by reason of any negligence or breach of contract by this cross-defendant.

Cross-defendant further says that at the time the cross-complainant entered into its contract with the State of Tennessee, and at all times thereafter and until the time of [fol. 98] the filing of its answer, cross-complainant was not authorized to do business in Tennessee because of its failure, neglect and refusal to pay the privilege tax required of it by law, which failure is especially pleaded and relied on in bar of cross complainant's right to maintain the cross-bill in this suit.

Cross-defendant further denies that it is indebted to the cross-complainant in any sum whatsoever by reason of any negligence or breach of its contract, and avers on the other hand that cross-complainant is justly indebted to it in the sum set out in its original bill.

All allegations contained in said cross-bill not already specifically denied are here and now generally denied, and denied as fully as though separately and specifically denied.

And now, having fully answered said cross-bill, cross-defendant prays that the cross-bill be dismissed at the cost of the cross-complainant.

Louis Leftwich, Bass, Berry & Sims, Solicitors for
International Steel & Iron Company.

[fol. 99] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

DECREE OF JANUARY 27, 1932

It appearing to the Court that R. H. Baker, Commissioner of Highways and Public Works for Tennessee, has agreed to accept, in substitution for the Refunding Bond executed on September 3rd, 1930, by the National Construction Company, contractor on Project No. S. B. P. 4-A, in Decatur-Perry Counties, known as "Perryville Bridge" as principal, and Equitable Casualty and Surety Company, as surety, a Substitute Refunding Bond in the sum of $40,000.00, executed by the National Construction Company as principal, and the Consolidated Indemnity and Insurance Company, as surety, said bond to contain all the conditions, stipulations and provisions of the said original Refunding Bond; and it further appearing that the National Construction Company agrees that the delivery and acceptance of said Substitute Refunding Bond shall not release the National Construction Company of any obligation or liability that it incurred on the original Refunding Bond of Septem-

[fol. 100] ber 3rd, 1930, but that said obligations and liabilities shall be the same as if said Substitute Refunding Bond had not been executed; and it further appearing that R. H. Baker, Commissioner, etc. agrees that the delivery and acceptance of said Substitute Refunding Bond shall release and discharge the Equitable Casualty and Surety Company and its receiver and liquidating agent, from any and all obligations assumed by it under said original Refunding Bond of September 3rd, 1930, and that said Substitute Refunding Bond shall be in lieu and discharge of the judgment entered in this cause on August 27th, 1931, wherein R. H. Baker, Commissioner, etc., was given a recovery of $77,099.32 against the National Construction Company;

It is ordered, adjudged and decreed by the Court, on consent of parties, as follows:

1. That the Substitute Refunding Bond, in the penalty of $40,000.00, dated January 23rd, 1932, executed by the National Construction Company, as principal, and the Consolidated Indemnity and Insurance Company, as surety, be accepted in the place and stead of the original Refunding Bond, dated September 3rd, 1930, executed by the National Construction Company, as principal, and the Equitable Casualty and Surety Company, as surety; and that said Substitute Refunding Bond, which is attached and filed as [fol. 101] Exhibit "A" to this decree, be lodged with the Registry of this Court.

2. The filing and acceptance of said Substitute Refunding Bond shall not release the National Construction Company of any obligation or liability that it incurred on the original Refunding Bond of September 3rd, 1930, but said obligations and liabilities shall be just the same as if the Substitute Refunding Bond had not been filed and accepted.

3. The Equitable Casualty and Surety Company, its Receiver, and Liquidating Agent, are released and discharged from any and all obligations and liabilities assumed by it under the original Refunding Bond of September 3rd, 1930.

4. The Substitute Refunding Bond shall be in lieu and discharge of the judgment entered in this cause on August 27th, 1931, wherein R. H. Baker, Commissioner, etc., was awarded a recovery of $77,099.32, against the National Con-

struction Company, as the same appears in Minute Book 25, page 7 of this Court.

5. This decree shall not prejudice, in any respect, the International Steel and Iron Company, or the National Surety Company.

[fol. 102] Approved for entry:

National Construction Company, by S. L. Felts, Solicitor. R. H. Baker, Commissioner of Highways and Public Works for Tennessee, by L. D. Smith, Attorney-General. International Steel & Iron Company, by Louis Leftwich, Cecil Sims, Solicitors. National Surety Company, by William Hume, Solicitor.

[fol. 103] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

DECREE OF OCTOBER 25, 1932

This cause was heard before Chancellor James B. Newman, on the 25th day of October, 1932, and previous days upon the entire record, oral argument and briefs of solicitors. At the conclusion of the oral argument, the complainant moved the Court to amend the original bill as follows:

"By adding thereto at the conclusion of Section 3 of the original bill, and immediately before the prayer, the following:

"Complainant avers that under the laws of Tennessee it is mandatory upon the defendant, R. H. Baker, Commissioner of Highways & Public Works of the State of Tennessee, to forthwith pay into this Court in this cause the amount retained by him out of the final estimate due to the defendant National Construction Company, sufficient to cover the amount due the complainant, to wit, $59,833.71, together with an additional amount sufficient to cover interest thereon, which may accrue during the litigation.'

"And to further amend by adding to the prayer of the [fol. 104] original bill, the following:

"That the defendant, R. H. Baker, Commissioner of Highways & Public Works of the State of Tennessee, be forthwith ordered and required by the Court to pay into this Court in this cause out of the funds retained and held by him, pursuant to the statutes of the State of Tennessee, a sum sufficient to cover the amount complainant is claiming to wit: $59,833.71, together with an additional sum sufficient to cover interest thereon that may be reasonably exterest thereon, which may accrue during the litigation."

The Court finds and is of opinion:

(a) That the complainant in its original bill alleged in substance that the refunding bond for the retainage was executed as provided by law and the Department of Highways and Public Works held it for the benefit of claimants who had filed their claims with the Department of Highways and Public Works, and prayed for a decree against the principal and the surety on the refunding bond for the amount claimed to be due the complainant. The proposed amendment calls for the payment of the retainage into Court by the Commissioner of Highways and Public Works. The complainant having sued on the bond and thereby treated it as a valid obligation, subjecting the principal and [fol. 105] surety thereon to the demands of complainant in a direct suit on the bond, cannot by an amendment, allege that it is the duty of the defendant, R. H. Baker, Commissioner of Highways and Public Works, to pay the retainage into Court for which the bond was executed. Where it is alleged that the bond was taken as provided by law, and the complainant has brought action thereon against the principal and surety, it cannot after the case has gone to trial, change its position by asserting as set forth in the proposed amendment that it is the duty of the Commissioner of Highways and Public Works, to pay the retainage into Court. The amendment is inconsistent and repugnant to the original bill and the application to amend the original bill as proposed, is denied.

(b) It was the joint action of the State of Tennessee, the obligee, and the principal, National Construction Company on the contractor's bond, of which the National Surety Company was surety, in executing the refunding bond and paying out the retainage held by the Department of Highways and Public Works. The beneficiary of this action was the National Construction Company and not the complainant, for whose benefit the contractor's bond was made, and but for the act of the National Construction Company for which the National Surety Company was surety, the retainage would still be in the office of the Department of Highways and Public Works.

[fol. 106] The contractor's bond protects the claimants and was executed for their benefit as much as for the benefit of the State, and they cannot be deprived of that protection by the joint act of the principal thereon, and the obligee, the State, and this is true whether the refunding bond was taken within or without statutory authority. As to the surety, the National Surety Company, the contractor's bond is in law not to be treated as performed until complainant's claim is paid, its payment being a condition of the bond. This liability has not been discharged. Furthermore, by Sec. 3222 of the Code, Sub-Sec. D, a contractor's bond is satisfied only when the retainage is paid into Court and the suit dismissed as to the Commissioner of Highways & Public Works. This has not been done in this case.

(c) The contract between the National Construction Company and the International Steel & Iron Company provides that the International Steel & Iron Company were to be notified twenty days prior to the time to begin erection, but it also expressly provides that it was understood that the part of the bridge work to be done by the principal contractor, National Construction Company was to be ready so that the International Steel & Iron Company could proceed with its work without interruption and subject to favorable local conditions for such erection. The National Construction Company under the contract did not have the unconditional [fol. 107] right to fix and determine the time when the International Steel & Iron Company should begin work and give the twenty days notice accordingly, but the notice given was subject to the right of the International Steel & Iron Company to determine whether the work done by the National Construction Company and the local conditions were such that it would not be interrupted after it begun work. This was the construction of the contract by both parties as shown by the letter of July 3, 1929, wherein the National Construction Company notified the International Steel & Iron Company that its work had progressed to the point where the International Steel & Iron Company could commence the erection of its work, and the International Steel & Iron Company accepted and acted under said notice as it had a right to do, as aforesaid.

Both parties treated this notice as a notice under the contract, and the National Construction Company after giving this notice and after work had been begun thereunder by the International Steel & Iron Company made payments to the International Steel & Iron Company on the work. The International Steel & Iron Company and the National Construction Company agreed that the former will "erect and paint * * * structural steel spans for a bridge across the Tennessee River known as the Perryville Bridge * * * as per plans and specifications covering this work as prepared by the State of Tennessee, Department of Highways & Public Works."

[fol. 108] The proof reveals that the party representing the International Steel & Iron Company in the preparation and execution of this contract, examined the plans and specifications embodied in the contract between the State and the contractor, National Construction Company and ascertained that it provided for liquidated damages of $80.00 per day for failure of the contractor to complete the contract within the time specified in the contract, and that when it sublet this work to Naill & Naill it provided that when they were to pay $80.00 per day liquidated damages for failure to complete the contract within the time provided, and after the work was begun, the defendant, National Construction Company deducted from payments made to the International Steel & Iron Company sums which it claimed as liquidated damages at $80.00 per day for failure to complete the work as it had contracted, though these deductions were subsequently paid. Furthermore, the contract after referring to the plans and specifications which provided for liquidated damages of $80.00 per day if the work was not completed by the principal contractor within a certain time, also provided that it was to complete its work in 115 working days, clearly conveying to the minds of the contracting party there would be some penalty if it did not complete within the 115 days.

Whatever may be the law in other jurisdictions with reference to incorporating in a sub-contract, plans and [fol. 109] specifications by reference thereto, the law in this State is well settled and elementary that the primary rule in the construction of any written contract is to ascertain and give effect to the mutual intentions of the parties, and to that end, such contracts must be construed with reference to the situation of the parties, the business to which it relates and its subject matter. In construing such contracts where the language is ambiguous, the interpretations placed thereon by the parties themselves as shown by their acts, will be adopted by the Court. And in determining what damages result from a breach of a contract, the Court will consider the circumstances which existed at the time the contract was made, and the damages the parties had in mind if the contract was breached, and which according to the understanding of both parties entered into and became a basis of the contract and will allow only such damages as may be reasonably supposed to have been in the contemplation of both parties at the time the contract was made as a result of a probable breach of it.

As stated in the case of Machine Co. vs. Compress Co. 105 Tenn. p. 204:

> "The general principle of compensation is that it should be equal to the injury. It is a rule based on that principle that the amount of the benefit which a party to a contract [fol. 110] would derive from its performance, is the measure of his damages if it be broken. It is a rule of interpretation, too, that the intention of the parties is to be ascertained from the whole contract considered in connection with the surrounding circumstances known to both parties. If it appear by these surrounding circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure a special gain or to avoid an anticipated loss, the liability of the other for a violation of the contract will be determined and the amount of damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances make it manifest that such damages were within the contemplation of the parties."

In the case under consideration, the only damages that the National Construction Company could have incurred to the State for failure to complete within the contract time, was $80.00 per day, and if the sub-contractor delayed it

beyond its contract time, this was the damage it would have had to pay. The National Construction Company was responsible for the completion of the entire job to the State, and in making the contract with the International Steel & Iron Company plainly intended that if it exceeded the 115 days in the completion of the structural steel work, that it should account to it for liquidated damages at $80.00 per [fol. 111] day. This was the construction of the contract by both parties at its inception, and after the work begun, and the provision for liquidated damages of $80.00 per day contained in the contract between the State and the National Construction Company is incorporated into the contract between the National Construction Company and the International Steel & Iron Company and the National Construction Company is limited to such damages in any recovery it may have against the International Steel & Iron Company for failure to complete its contract within 115 days from the time it should have begun work under its contract.

The Court further finds, and is of opinion:

1. That the National Construction Company notified the International Steel & Iron Company on July 3, 1929 in accordance with their contract to begin work on the Perryville Bridge Project, and this notice was received by the International Steel & Iron Company on July 25, 1929 and on that date the 115 working days begun, and these working days are determined by what was a working day under the original contract between the State and the National Construction Company and measured by this test the 115 working days expired on June 12, 1930. The complainant, International Steel & Iron Company completed its work July 2, 1930, being in default under its contract, 15½ working days and liable to the National Construction Company under its contract therefor, in the sum of $80.00 per day which [fol. 112] amounts to $1,240.00.

2. That the National Construction Company is indebted to the International Steel & Iron Company in the sum of $59,833.71 less the aforesaid sum of $1,240.00 but is not entitled to interest thereon.

Mack v. Huggar Bros. Constr. Co., 10 Tenn. App. Reports, p. 420.

It is therefore ordered, adjudged and decreed by the Court:

(a) That the complainant International Steel & Iron Company have and recover of the defendants, National Construction Company and the National Surety Company the sum of $58,593.71 for which let execution issue.

(b) That the defendants National Construction Company and the National Surety Company pay seven-eighths of the costs of this cause, and the complainant, International Steel & Iron Company one-eighth of the costs of this cause, for which let execution issue.

It appearing from the record that the defendant, R. H. Baker, Commissioner, etc., and the National Construction Company in lieu and discharge of a judgment entered in this cause on August 27, 1931, wherein R. H. Baker, Commissioner, etc., was awarded a recovery for $77,099.32 for the retainage paid by him to the National Construction Company have agreed to accept a substitute refunding bond [fol. 113] in the sum of $40,000.00 which was executed on January 23, 1932, by the National Construction Company as principal and the Consolidated Indemnity & Insurance Company as surety. The condition of said bond is,

"Now, therefore, if said National Construction Company shall pay the above listed claims as may be adjudicated just, proper and legal claims against it on said project, or failing to pay such claims shall refund to the State of Tennessee the sum of $40,000.00, then this obligation to be void, otherwise to remain in full force and effect."

and by a consent decree entered in Minute Book 25, page 297 on January 27, 1932, and signed by the National Construction Company, Baker, Commissioner, etc., the International Steel & Iron Company and the National Surety Company, said substitute refunding bond which is filed as Exhibit "A" to the decree, is lodged with the registry of this Court.

It is therefore ordered, adjudged and decreed by the Court that R. H. Baker, Commissioner of Highways and Public Works for Tennessee, be and is ordered and directed to collect and pay the penalty of said bond into Court in this cause, to be credited on the judgment herein rendered against the National Construction Company and the National Surety Company.

To the action of the Court in declining to permit the amendment to the original bill which seeks to require the defendant, R. H. Baker, Commissioner of Highways & Pub-[fol. 114] lic Works to pay into Court sufficient money to cover complainant's claim, and costs, and in declining to order said sum paid into Court by said defendant, and to the action of the Court in holding complainant International Steel & Iron Company liable to National Construction Company for $1,240.00 damages, and to the refusal of the Court to allow interest the complainant duly excepted, and prayed an appeal to the Court of Appeals sitting at Nashville, which is granted by the Court upon the complainant giving bond and otherwise perfecting said appeal within thirty days as required by law.

[fol. 115] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

DECREE OF NOVEMBER 18, 1932

This cause came on to be re-heard this November 17, 1932, before Chancellor James B. Newman, upon the petition to rehear, the reply thereto and the whole record in the cause, and argument of counsel having been heard, on consideration of all of which it is ordered, adjudged and decreed by the Court that the prayer of the petition be granted and the cause re-heard only to the extent prayed.

And thereupon it is ordered and decreed that the following part of the decree pronounced in this cause on October 25, 1932, and entered in Minute Book 26, pages 332-335, viz: "It is therefore ordered, adjudged and decreed by the Court that R. H. Baker, Commissioner of Highways and Public Works for Tennessee, be and is ordered and directed to collect and pay the penalty of said bond into Court in this cause to be credited on the judgment herein rendered against the National Construction Company and the National Surety Company", be set aside, recalled and annulled, and that said decree entered in Minute Book 26, [fol. 116] pages 332-335 be amended by adding thereto after the words in said decree, "said Substitute refunding bond which is filed as Exhibit A to the decree is lodged with the registry of this Court," the following:

"That the complainant have and recover of the National Construction Company and the Consolidated Indemnity

Insurance Company the sum of $40,000.00 for which let execution issue, and when said sum is collected it shall be credited on the judgment rendered against the National Construction Company and the National Surety Company of $58,593.71." The decree entered in Minute Book 26, pages 332-335 is changed only as above indicated, and in all other respects is approved and confirmed.

To so much and such parts of the decree entered in Minute Book 26, pages 332-335 as renders judgment against it for $58,593.71 and taxes it with seven-eighths of the costs of the cause, the National Surety Company excepts and prays an appeal to the present term of the Court of Appeals, sitting at Nashville, which is by the Court granted upon its executing bond as required by law, and it is allowed thirty days from this date in which to perfect its appeal.

Upon application of the defendant, the National Construction Company, the decree heretofore entered in this cause in Minute Book 26, page 353, granting it an appeal, is set aside. Thereupon, the defendant the National Construction Company excepts to the decree entered in Minute [fol. 117] Book 26, pages 332-335 and the foregoing decree amendatory thereof, and prays a broad appeal from said decree as amended, to the present term of the Court of Appeals sitting at Nashville, which is by the Court granted upon its executing bond as required by law, and it is allowed thirty days from this date in which to perfect its appeal.

O. K. for entry:

Hume & Armistead, Bass, Berry & Sims, Louis Leftwich, Solicitors for Complainant.

[fol. 118] IN COURT OF APPEALS OF TENNESSEE

Sitting at Nashville

[File endorsement omittted]

Equity No. ——

INTERNATIONAL STEEL & IRON COMPANY

vs.

NATIONAL CONSTRUCTION COMPANY, ET ALS.

ASSIGNMENTS OF ERROR ON BEHALF OF NATIONAL SURETY COMPANY, APPELLANT—Filed March 23, 1933

[fol. 119] I

The Chancellor erred in not dismissing the suit as to National Surety Company.

II

The Chancellor erred in rendering judgment against National Surety Company for $58,593.71.

III

The Chancellor erred in not holding that the final settlement made by the Commissioner with the National Construction Company, on September 3d. 1930, the release of the retainage, the acceptance of a new bond in place of the retainage, and the delivery of the bond in Court in response to the suit thereon, was a fulfilment of the duties of the Commissioner and a satisfaction and discharge of the contractor's first bond on which the National Surety Company was surety.

[fols. 120 & 121] Bond on Appeal for $60,000.00 approved and filed Dec. 16, 1932, omitted in printing.

[fol. 122] [File endorsement omitted.]

[fol. 123] IN COURT OF APPEALS OF TENNESSEE

Davidson Chancery

INTERNATIONAL STEEL & IRON COMPANY

v.

NATIONAL CONSTRUCTION COMPANY ET AL.

OPINION—Filed Dec. 2, 1933

This case is before us on the appeal of National Surety Company from a judgment against it and in favor of International Steel & Iron Company for $58,593.71 and seven-eighths of the costs accrued in the Chancery Court.

On March 12, 1928, the National Construction Company contracted with the Department of Highways and Public Works of the State of Tennessee to construct a bridge over the Tennessee River in Perry and Decatur Counties, in this State, Known to the Department as "Special Bridge Project #4-A", and generally known to the public as the Perryville Bridge.

On the same day, the National Construction Company executed a bond in the penalty of $285,976.20, with appellant, National Surety Company, as surety thereon, guaranteeing the performance of said contract. Neither the bond nor the contract is in the record brought to this Court (which record was "designated" by the solicitors for ap- [fol. 124] pellant, upon due notice to solicitors for appellees), but it is, in substance, admitted in the pleadings that this bond was executed pursuant to and in conformity with the Highway Act of 1917, ch. 74, which provides that, "All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work", and "This bond must be approved by the Department and filed with his records."

On March 22, 1928, the International Steel & Iron Com[illegible]pany contracted with the National Construction Company to furnish certain structural and cast steel, including sheet lead and structural steel spans, for which the National Construction Company agreed to pay to the International Steel

& Iron Company the sum of $135,020.53, and all of which was thereafter furnished and delivered by the International Steel & Iron Company and was used in the construction of said bridge.

The bridge was completed on July 2, 1930, and was, on that date, accepted by the Department of Highways and Public Works as a completed Project.

During the progress of the work payments on account were made to the International Steel & Iron Company from time to time, which payments aggregated $75,186.82, leav-[fol. 125] ing an unpaid balance of $59,833.71 on the contract price at the time of the completion of the bridge on July 2, 1930.

Pursuant to the provisions of section 6 of chapter 74 of the Acts of 1917, the Commissioner of Highways and Public Works advertised in newspapers published in Decatur and Perry Counties, respectively, that settlement was about to be made with the principal contractor on said Project, and notifying all claimants to file notice of their claims with the Department of Highways and Public Works—the last publication of said advertisement being made on August 20, 1930.

On August 19, 1930, the International Steel & Iron Company filed notice of its claim for the aforesaid sum of $59,833.71 with the Commissioner of Highways and Public Works, and at the same time filed with the Commissioner a bond in a penal sum equal to the amount of its claim, in the manner and form prescribed by subsection (e) of section 1 of chapter 80 of the Acts of 1929.

The Commissioner of Highways and Public Works fixed September 3, 1930, as the day and date for final settlement with the principal contractor, National Construction Company, at which time the Commissioner had in his hands the sum of $77,099.32, which he had withheld from the principal contractor, National Construction Company, and which was a sufficient sum to pay all claims of which notice had been [fol. 126] filed with him.

On the aforesaid day set for final settlement (September 3, 1930), the National Construction Company as principal, and the Equitable Casualty & Surety Company, as surety, executed a "refunding bond", in words and figures as follows:

"Refunding Bond

We, the National Construction Company, as Principal, and Equitable Casualty & Surety Company, as Surety, acknowledge ourselves indebted and firmly bound unto the State of Tennessee, in the sum of $77,099.32, Seventy Seven Thousand and Ninety-Nine and 32/100, Dollars.

The condition of the above obligation is such that:

Whereas, the Department of Highways and Public Works of the State of Tennessee, hereinafter called the 'Department' has this day made final settlement with the National Construction Company contractor on Project No. S. B. P. 4—being the construction of a steel and concrete bridge over Tennessee River known as 'Perryville Bridge' hereinafter called the contractor, by paying said contractor $77,099.32, Seventy Seven Thousand Ninety-nine and 32/100, the amount of the final retainage heretofore withheld, and [fol. 127] Whereas, there has been filed with said Department the following listed claims against said Contractor on said Project, to-wit:

Longstaff Orm Lumber Company	$2,188.52
C. A. Livingstone	90.00
Tennessee Mill & Mine Supply Company	499.92
Henry A. Petter Supply Co.	2,624.92
Chicago Pneumatic Tool Co.	688.22
Manhattan Rubber Mfg. Co.	94.40
George A. McDonald	1,136.87
J. E. Reynolds	375.00
Hassell Lumber Company	2,733.65
W. R. Dennison	243.80
C. G. Kershaw Contracting Company	300.00
Williams & Guinn	73.50
International Steel & Iron Co.	59,833.71
Day-Evans Iron Works, Inc.	110.16
Hermitage Portland Cement Co.	242.80
J. K. Martin	105.00
Standard Oil Co. of La.	704.08
J. O. Ashman	223.00
Sverre Olsen	1,242.85

Now, therefore, if the said National Construction Company shall pay such of the above listed claims as may be [fol. 128] adjudicated just, proper and legal claims against it on said Project, or failing to pay such claims, shall refund to the State of Tennessee the $77,099.32 this day paid it with interest; then this obligation to be void, otherwise, to remain in full force and effect.

This obligation is executed under the provision of Chapter 80, Acts of 1929, and upon full understanding by all parties that it stands in place and in lieu of said $77,099.32, the retainage this day paid the contractor; that it is executed to protect said Department and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the contractor on said Project, as fully as if the retainage had not been paid to the contractor but had been withheld by the Department, and said claimants or any of them, in the event their claims are adjudicated just, proper and legal claims against said Project, are authorized by all parties hereto to bring suit on this bond, provided, the liability of the surety hereto shall not exceed $77,099.32, the amount of the retainage this day paid to the contractor, together with such interest and cost as the Court may allow.

[fol. 129] This the 3rd day of September, 1930.

National Construction Company, by John A. McDonald, President. Principal. Equitable Casualty & Surety Company, Surety, by Howard Dye, Attorney-in-fact."

The above quoted "refunding bond" was delivered to and accepted by, the Commissioner of Highways and Public Works, who thereupon paid over to the principal contractor, National Construction Company, the sum of $77,099.02 which had been theretofore retained or withheld by him as aforesaid.

On September 12, 1930, the bill in this case was filed by International Steel & Iron Company, as complainant, against National Construction Company, National Surety Company, Equitable Casualty & Surety Company and R. H. Baker, Commissioner of Highways and Public Works of the State of Tennessee, as defendants. All the parties, except R. H. Baker, Commissioner etc., are (or were when the bill was filed) corporations organized under the laws of States other than Tennessee.

In its bill, complainant International Steel & Iron Company set forth, in substance, the facts we have stated, and alleged that the Department of Highways and Public Works "now holds said refunding bond for the benefit of [fol. 130] claimants who had filed their claims with said Department of Highways and Public Works."

After the usual prayer for process and waiver of answer on oath, complainant prayed for a decree against National Construction Company, National Surety Company and Equitable Casualty & Surety Company for $59,833.71 and costs, and also prayed for general relief.

On October 4, 1930, R. H. Baker, Commissioner etc., filed a pleading in the nature of an answer to the original bill (but which is styled "petition"), in which he stated that final settlement was made with the contractor, National Construction Company, on September 4, 1930; that under chapter 74 of the Acts of 1917, and Acts amendatory thereof, a refunding bond was executed by the contractor covering the amount of all claims filed with the Department of Highways and Public Works against said Project, including the claim on which this suit was brought; that the claimant, International Steel & Iron Company, filed with the Department a claim in the amount of $59,833.71 for materials, supplies and labor furnished and used in the construction of the Perryville Bridge, and also a claimant's bond covering said claim. Certified copies of the "refunding bond", the "claim" of the International Steel & Iron Company, and the "claimant's bond", respectively, were filed with the "petition" as exhibits thereto.

[fol. 131] The Commissioner concluded his "petition" with the statement that he had "fully answered as required by chapter 80, Public Acts of 1929", and he prayed "that this suit be dismissed as to him."

On May 19, 1931, defendant National Construction Company answered the bill, and filed its answer as a cross-bill seeking to recover damages for an alleged breach of contract by complainant, in that, complainant had delayed the performance of its contract for more than ten months beyond the stipulated period, which delay had resulted in loss and damage to defendant National Construction Company to an amount "far more than the amount sought by complainant's bill."

The International Steel & Iron Company answered said cross-bill and denied that it had breached its contract in any respect, and denied that it was indebted to cross-complainant, National Construction Company, in any sum whatever by reason of any negligence or breach of contract.

On June 26, 1931, R. H. Baker, Commissioner of the Department of Highways and Public Works, filed (by leave of the Court) a petition in which he recited the filing of his aforementioned "answer in this cause" on October 4, 1930, and the contents thereof, particularly the fact of the execution by National Construction Company of a "refunding [fol. 132] bond" in the penalty of $77,099.32, with the Equitable Casualty & Surety Company as surety thereon, and then alleged that "the Equitable Casualty & Surety Company became insolvent, its corporate charter forfeited, surrendered and annulled; the corporation dissolved and its affairs are now in process of liquidation by the Superintendent of Insurance of the State of New York."

It was further alleged in said petition that said refunding bond was executed to stand in place and in lieu of said $77,099.32, the amount of retainage paid to the National Construction Company; that it was executed to protect said Department of Highways and Public Works and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the National Construction Company on said project, as fully as if the retainage had not been paid to the National Construction Company, but had been withheld by the Department.

Petitioner then enumerated the several "claimants protected by said refunding bond" whose claims had not been paid and who then had suits pending, which aggregated $69,551.65, including the claim of the International Steel & Iron Company for $59,833.71.

Petitioner alleged, on information, that the National [fol. 133] Construction Company is a foreign corporation and has no property or place of business in Tennessee.

For the terms and provisions of said refunding bond, petitioner referred to the certified copy of same attached to his answer to the original bill and filed as Exhibit A thereto, and he alleged that "inasmuch as nearly $70,000.00 of claims protected and guaranteed by said refunding bond have not been paid, and suits are pending seeking to collect the same, and inasmuch as the Equitable Casualty and Surety Company, surety on said refunding bond, is insolvent and its guarantee of no value, Petitioner is advised, and so insists, that the National Construction Company should be required to refund and pay into the Registry of this Court an amount sufficient to protect the claims aforesaid, on which suits are now pending, or in lieu to provide a good and sufficient corporate surety to take the place of the Equitable Casualty and Surety Company, insolvent."

The prayer of said petition is that (1) petitioner be allowed to file this petition to this cause and that a copy thereof be served on the defendant National Construction Company; (2) that a decree be entered requiring the defendant, National Construction Company, to refund and pay into the Registry of the Court the sum of $77,099.32, or, in lieu to file a bond with good and solvent corporate surety, in the same words and figures, and to take the place of the refunding bond, a certified copy of which is [fol. 134] filed as Exhibit A to the answer of petitioner herein to the original bill in this cause, and (4) for general relief.

On June 30, 1931, the National Construction Company filed an answer to the said petition of the Commissioner of Highways and Public Works, and therein admitted that its surety on said refunding bond, The Equitable Casualty & Surety Company, after making said refunding bond on September 4, 1930, became insolvent on December 30, 1930, and that its affairs are in the process of liquidation in the Courts of the State of New York.

The National Construction Company further alleged in its answer that it "is advised that said settlement and payment to it of said $77,099.32 was a final settlement and payment to it and that it cannot properly be required to refund said money or to execute another bond at the instance of petitioner Baker because in making said settlement petitioner Baker acted in accordance with the law and incurred no liability whatever to any of said claimants."

On June 30, 1931, the Chancellor decreed that "the National Construction Company be and is ordered and directed to execute a refunding bond in the same penalty and for the same purposes as the refunding bond heretofore executed by it, with sufficient surety thereon to be ap-[fol. 135] proved by R. H. Baker, Commissioner of the Department of Highways and Public Works, on or before the 7th day of July 1931, and upon failure to execute said bond by the time aforesaid, said National Construction Company is ordered and directed to pay back into the office of R. H. Baker, Commissioner of the Department of Highways and Public Works, the sum of $77,099.32."

On July 8, 1931, the Chancellor overruled a petition of the National Construction Company for a rehearing, but extended the time for its compliance with the aforesaid order of June 30, 1931, until August 7, 1931.

The National Construction Company did not comply with the order of June 30, 1931, and on August 27, 1931, the Chancellor decreed that R. H. Baker, Commissioner etc., recover of defendant National Construction Company the sum of $77,099.32, and the costs incident to the petition filed by the Commissioner, for all of which execution was awarded.

On October 29, 1931, the defendant National Surety Company answered the original bill and admitted the contract between the National Construction Company and the Department of Highways and Public Works for the construction of the Perryville Bridge and the contract between the International Steel & Iron Company and the National Construction Company as hereinbefore set forth. Defendant National Surety Company then alleged in its answer that, [fol. 136] "on September 3rd, 1930, the Department of Highways and Public Works of the State of Tennessee held as final retainage on the project aforesaid the sum of $77,099.32, which was in excess of the amount required to pay in full all claims that were filed, and that all of said claims were fully protected; that on September 3rd, 1930, the Department of Highways and Public Works of the State of Tennessee released said $77,099.32 to the National Construction Company, and accepted a refunding bond conditioned as follows: (Here the conditions of the "refunding bond" hereinbefore copied are set forth, and the answer then proceeds and concludes as follows):

"It is insisted that the release of said retainage and acceptance of said refunding bond necessarily released and relieved this defendant of any liability to the Department of Highways and Public Works of the State of Tennessee, for any and all claims set forth in said refunding bond, one of which was the claim of the complainant. It is further insisted that the release of said retainage and the acceptance of said refunding bond necessarily released and relieved this defendant of any and all liability to each and every claimant included in said refunding bond, one of which was the complainant herein.

[fol. 137] All averments of the bill not hereinbefore expressly admitted or denied, are here and now generally denied, and denied as fully as if separately and specifically denied.

And now, having answered, this defendant prays to be dismissed."

On January 27th, 1932, a decree was entered in words and figures as follows:

"It appearing to the Court that R. H. Baker, Commissioner of Highways and Public Works for Tennessee, has agreed to accept, in substitution for the refunding bond executed on September 3rd, 1930, by the National Construction Company, contractor on Project No. S. B. P. 4-A, in Decatur-Perry Counties, known as 'Perryville Bridge' as principal, and Equitable Casualty and Surety Company, as surety, a Substitute Refunding Bond in the sum of $40,000.00, executed by the National Construction Company as principal, and the Consolidated Indemnity and Insurance Company, as surety, said bond to contain all the conditions, stipulations and provisions of the said original refunding bond; and it further appearing that the National Construc-[fol. 138] tion Company agrees that the delivery and acceptance of said Substitute Refunding Bond shall not release the National Construction Company of any obligation or liability that it incurred on the Original Refunding Bond of September 3rd, 1930, but that said obligations and liabilities shall be the same as if said Substitute Refunding Bond had not been executed; and it further appearing that R. H. Baker, Commissioner, etc., agrees that the delivery and acceptance of said Substitute Refunding Bond shall release and discharge the Equitable Casualty and Surety Company and its receiver and liquidating agent, from any and all obligations assumed by it under said Original Refunding Bond of September 3rd, 1930, and that said Substitute Refunding Bond shall be in lieu and discharge of the judgment entered in this cause on August 27th, 1931, wherein R. H. Baker, Commissioner, etc., was given a recovery of $77,099.32 against the National Construction Company;

It is ordered, adjudged and decreed by the Court, on consent of parties, as follows:

1. That the Substitute Refunding Bond, in the penalty of $40,000.00, dated January 23rd, 1932, executed by the National Construction Company, as principal, and the Consolidated Indemnity and Insurance Company, as surety, be [fol. 139] accepted in the place and stead of the Original Refunding Bond, dated September 3rd, 1930, executed by the National Construction Company, as principal, and the Equitable Casualty and Surety Company, as surety; and that said Substitute Refunding Bond, which is attached and filed as Exhibit 'A' to this decree, be lodged with the Registry of this Court.

2. The filing and acceptance of said Substitute Refunding Bond shall not release the National Construction Company of any obligation or liability that it incurred on the original Refunding Bond of September 3rd, 1930, but said obligations and liabilities shall be just the same as if the Substitute Refunding Bond had not been filed and accepted.

3. The Equitable Casualty and Surety Company, its Receiver, and Liquidating Agent, are released and discharged from any and all obligations and liabilities assumed by it under the Original Refunding Bond of September 3rd, 1930.

4. The Substitute Refunding Bond shall be in lieu and discharge of the judgment entered in this cause on August 27th, 1931, wherein R. H. Baker, Commissioner, etc., was awarded a recovery of $77,099.32, against the National Construction Company, as the same appears in Minute Book 25, page 7, of this Court.

[fol. 140] 5. This decree shall not prejudice, in any respect, the International Steel and Iron Company, or the National Surety Company."

The "substitute refunding bond" mentioned and described in the foregoing decree of January 27, 1932, was "approved and accepted on behalf of the State of Tennessee" by R. H. Baker, Commissioner of Highways and Public Works, and L. D. Smith, Attorney-General.

The case was thereafter heard by the Chancellor upon the entire record, and the decree was entered on October 25, 1932, but we need tc mention here only those matters adjudicated in said decree which are pertinent to the issues presented on this appeal.

With respect to the liability of the appellant, National Surety Company, the Chancellor held and adjudged as follows:

"It was the joint action of the State of Tennessee, the obligee, and the principal, National Construction Company on the contractor's bond, of which the National Surety Company was surety, in executing the refunding bond and paying out the retainage held by the Department of Highways and Public Works. The beneficiary of this action was the National Construction Company and not the complainant, for whose benefit the contractor's bond was made, and [fol. 141] but for the act of the National Construction Company for which the National Surety Company was surety, the retainage would still be in the office of the Department of Highways and Public Works.

The Contractor's bond protects the claimants and was executed for their benefit as much as for the benefit of the State, and they cannot be deprived of that protection by the joint act of the principal thereon, and the obligee, the State, and this is true whether the refunding bond was taken within or without statutory authority. As to the surety, the National Surety Company, the contractor's bond is in law not to be treated as performed until complainant's claim is paid, its payment being a condition of the bond. This liability has not been discharged. Furthermore, by Sec. 3222 of the Code, Sub-Sec. D, a contractor's bond is satisfied only when the retainage is paid into Court and the suit dismissed as to the Commissioner of Highways and Public Works. This has not been done in this case."

The Chancellor decreed that National Construction Company recover of International Steel & Iron Company the sum of $1240.00 by way of recoupment under its cross-bill on account of damages for the failure of the International [fol. 142] Steel & Iron Company to perform its contract within the contract period, and was entitled to set off said recovery of $1240.00 pro tanto against the indebtedness of the National Construction Company to the International Steel & Iron Company.

Thereupon the Chancellor adjudged and decreed that complainant International Steel & Iron Company recover of the defendants National Construction Company and National Surety Company the sum of $58,593.71 for which execution was awarded, and that defendants National Construction Company and National Surety Company pay seven-eighths of the cost of this cause, and the complainant International Steel & Iron Company pay one-eighth of the cost of the cause.

In said decree of October 25, 1932, the Chancellor also ordered and directed R. H. Baker, Commissioner of Highways and Public Works, to collect and pay into Court in this cause the penalty of the aforseaid "substitute refunding bond", to be credited on the judgment rendered against National Construction Company and National Surety Company.

On November 10, 1932, the National Surety Company filed a petition for a rehearing through which it insisted that a judgment should have been rendered against the Consolidated Indemnity Company, the surety on the "substitute refunding bond," for $40,000.00, the penalty of said bond.

[fol. 143] The Consolidated Indemnity Company, by answer filed on November 17, 1932, resisted the rehearing sought by National Surety Company; but, by decree entered on November 18, 1932, the Chancellor granted the prayer of the petition "to the extent prayed", and set aside the aforementioned order directing the Commissioner of Highways and Public Works to collect and pay the penalty of the "substitute refunding bond" into Court, and decreed "that the complainant have and recover of the National Construction Company and the Consolidated Indemnity Insurance Company the sum of $40,000.00 for which let execution issue, and when said sum is collected it shall be credited on the judgment rendered by the National Construction Company and the National Surety Company of $58,593.71.

The National Surety Company excepted to the decree rendering judgment against it for $58,593.71 and taxing it with seven-eighths of the cost of the cause, and prayed an appeal therefrom to this Court, which appeal was granted by the Chancellor and perfected by the appellant.

There is no evidence in the "designated" record before us, other than the exhibits to pleadings which have been mentioned.

In this Court, the appellant has assigned errors as follows: (1) The Chancellor erred in not dismissing the suit as to National Surety Company; (2) the Chancellor erred [fol. 144] in rendering judgment against National Surety Company for $58,593.71; and (3) the Chancellor erred in not holding that the final settlement made by the Commissioner with the National Construction Company, on September 3, 1930, the release of the retainage, the acceptance of a new bond in place of the retainage, and the delivery of the bond in Court in response to the suit thereon, was a fulfillment of the duties of the Commissioner and a satisfaction and discharge of the contractor's first bond on which the National Surety Company was surety."

As before stated herein, the defense interposed by appellant National Surety Company in its answer to the original bill was that the release of the "retainage" of $77,099.32 necessarily released and relieved it (National Surety Company) of any liability to the Department of Highways and Public Works and/or each and every claimant included in said refunding bond, one of which was the complainant International Steel & Iron Company.

The learned Chancellor held otherwise, for the reasons stated in that part of his decree hereinbefore copied.

The fundamental proposition upon which the argument of counsel in support of the decree is predicated, is (as we understand the brief and argument for appellee) embraced in an excerpt therefrom as follows:

[fol. 145] "Appellant entered into its bond with a full knowledge of the provisions of Chapter 80 of the Acts of 1929, and guaranteed that National Construction Company would pay off its obligations, knowing that the National Construction Company would have the right under the law to take down its retainage upon the execution of a refunding bond, pending the determination of the validity of any contested claim. In other words, National Surety Company obligated itself to pay any valid claim of appellee against the National Construction Company and entered into this obligation knowing that the law permitted the Highway Commissioner to pay over the money during a pendency of the controversy of the National Construction Company if it executed a refunding bond that appeared satisfactory to the Commissioner, National Surety Company did not merely guarantee that the Highway Commissioner would retain a sufficient amount to pay the claim—it guaranteed and obligated itself to see that National Construction Company would pay the obligation to the International Steel & Iron Company in lawful money of the United States. Until such payment has been made it is clear that National Surety Company remains obligated under its bond. No [fol. 146] act of the Commissioner in handling the retainage, whether lawful or unlawful, which falls short of actual payment of the money, either to appellee or in Court for its benefit, could have the legal effect of satisfying the obligation of appellant's bonds."

The statement that "appellant entered into its bond with a full knowledge of the provisions of Chapter 80 of the Acts of 1929", and therefore knew "that the National Construction Company would have the right under the law to take down its retainage upon the execution of a refunding bond, pending the determination of the validity of any contested claim", involves an impossible assumption, for the reason that the Act of 1929, Chapter 80, was enacted more than a year after the bond here in question was executed by applicant Surety Company.

By its own terms the Act of 1929, Chapter 80 (which was "passed" April 10, 1929, and "approved" April 11, 1929) took effect "from and after its passage", and it contains no language which indicates a Legislative intent that it should have a retrospective operation.

It is a rule of statutory construction that all statutes are to be construed as having only a prospective operation, unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily [fol. 147] implied from the language used. In every case of doubt, the doubt must be resolved against the retrospective effect. Heiskall v. Lowe, 126 Tenn. 475, 491, 153 S. W. 284; Black on Interpretation of Laws, 2nd Ed., page 385; Wade v. Madding, 161 Tenn. 88, 105, 28 S. W. (2nd) 642.

In an article on "Statutes and Statutory Construction" found in Vol. 1 of the Federal Statutes Annotated (page 54, sec. 37, note 14), a large number of cases are cited in support of the statement that "retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature."

In Black on Interpretation of Laws, supra (page 386-388), it is said:

> "The reason for this rule is the general tendency to regard retrospective laws as dangerous to liberty and private rights, on account of their liability to unsettle vested rights or disturb the legal effect of prior transactions. * * * While it is true as stated in the preceding section, that many statutes would be unconstitutional if given a retrospective application, and that the endeavor will be made to void this effect by construction, yet the general rule now [fol. 148] under consideration does not depend upon the question of constitutionality or unconstitutionality in the particular case. Independently of the organic law—that is, even in cases where a retrospective construction would not make the statute obnoxious to any constitutional provision —it will not be so construed, except in the case of a purely remedial law, unless the Legislative intention in that regard is perfectly plain."

With respect to the rule stated in the text last quoted, our Supreme Court (in the case of Hannum v. Bank, 1 Cold. 398, 402, has said:

> "This doctrine has been adhered to generally and steadfastly in England, and it is to be found incorporated as a fundamental principle in the jurisprudence of the most enlightened and civilized States, ancient and modern; and this by force of its intrinsic reason and justice, and not because of any positive constitutional prohibition to the contrary.
>
> The principle has likewise been adhered to in this country with great uniformity of decision. See Sedgw. on Stat. & Const. Law, 188, 406; 7 Johns, 477; 3 Dall. 391, and cases referred to. And the soundness of this principle of inter- [fol. 149] pretation is sufficiently supported by the most

obvious principles of reason and justice wherever past contracts or vested rights are involved, aside from any positive restrictions imposed by the State and Federal Constitutions.

It is repugnant to every man's common sense and reason, and sense of justice, that a contract or promise sanctioned by the existing law, and vesting the parties with positive legal rights when made, should be annulled and rendered inoperative by a subsequent law.''

The Act of 1929, Chapter 80, is an amendment to Chapter 74 of the Public Acts of 1917, but this does not take it out of the general rule just stated.

''An amendatory statute, like other Legislative Acts, takes effect only from its passage, and will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied. * * * With respect to rights accrued and contracts made under and by virtue of the old statute, it will not be understood (unless the Legislature plainly so wills it) that they are to be abrogated or modified by the amending Act, but, on the [fol. 150] contrary, the old law remains in force so far as necessary for their vindication and enforcement.'' Black on Interpretation of Laws, 2nd Ed., pp. 584-585. See also, for the rule that amendatory statute applies only to things done after its passage, Hannum v. McInturff, 6 Baxt 225; Noll & Thompson v. Railroad, 112 Tenn. 140, 146, 79 S. W. 380; Coke & Coal Co. v. Steel Co., 123 Tenn. 428, 439, 131 S. W. 988, 31 LRANS 278.

For the reasons stated, we are of the opinion that the Act of 1929, Chapter 80, is inapplicable to the present controversy.

''The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which effect its validity, construction, discharge and enforcement.'' Walker v. Whitehead, 83 U. S. 314, 21 L. Ed. 357, 358. Acc. Hannum v. McInturff, supra, page 230; Hannum v. Bank, supra, page 403.

This brings us to a consideration of certain provisions of Chapter 74, Public Acts of 1917, which were in force and operative with respect to highway contracts and bonds to secure their performance at the time of the execution, in March 1928, of the contract and bond involved in this case.

The provisions of the Act of 1917, Chapter 74, directly [fol. 151] pertinent to the present controversy, are found in Section 6 thereof, and are as follows:

> "All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work. This bond must be approved by the Department and filed with its records. The contract shall provide that the work executed thereunder shall be subject to the inspection, approval, and acceptance of the State Highway Engineer or his assistant engineer acting on oath and under bond. Not more than ninety per cent of the contract price shall be paid on any contract until it is completed and the work is accepted. Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his sub-contractors, or his agents, has been fully paid for and all laborers and other employees working for him, his sub-contractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days [fol. 152] notice in some newspaper published in the County where the work is done, if there be a newspaper published there, and if not, in a newspaper in an adjoining County, that settlement is about to be made and notify all claimants to file notice of their claim with the Secretary of the Department. The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction."

It is seen that, under the above quoted provisions of the Act of 1917, Chapter 74, it was the duty of the Secretary of the Department of Highways and Public Works (the Commissioner since the "Reorganization Act" of 1923, Chapter 7) to withhold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice was filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some Court of competent jurisdiction. But, notwithstanding the statutory requirement just mentioned, the Commissioner, after due and seasonable notice of claims for materials and labor used on the Project, [fol. 153] aggregating slightly more than $69,000.00 (and including the claim of complainant International Steel & Iron Company), paid to the contractor, National Construction Company, the full sum due on the contract, viz: $77,099.32, without waiting "a reasonable time", or any time, "to allow claimants to sue for and prove their claims against the contractor or his agent, in some Court of competent jurisdiction."

The Commissioner assumed to act (in thus paying over the "retainage" to the contractor, National Construction Company) under Chapter 80 of the Public Acts of 1929, which amends the Act of 1917, Chapter 74, Section 6, by striking out the provision that, "the Secretary of the Department shall withold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent in some Court of competent jurisdiction", and substituting therefor, among others, provisions as follows:

"(a) 'The Secretary of the Department (now the Commissioner of Highways and Public Works) shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow [fol. 154] claimants to sue and prove their claims against the contractor or his agent, in some Court of competent jurisdiction. In the event suit is brought against the contractor within the sixty days from the date of the last advertising, by any claimant, the Department or its officers shall pay the amount of said claim into Court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.

(b) 'On the date set for full and final settlement with the contractor, the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission; whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full.

(c) 'All suits against contractors brought by any claimant shall make the Commissioner of Highways and Public Works a defendant thereto and, except where the same be for sums within the jurisdiction of a Justice of the Peace, shall be brought in the County where the main office of the Department of Highways and Public Works is situated. [fol. 155] On any such suit being brought the sums then withheld may be paid into Court, as above provided, by simple petition of the Commissioner which may be substantially as follows:

'Your petitioner, the Commissioner of Highways and Public Works, respectfully represents that under Chapter 74 of the Public Acts of 1917, and acts amendatory thereof, he has retained from (here insert name of contractor) on final estimate or settlement, $——, equal in amount to the claim of (here insert name of claimant), as the same was filed and presented to the Department of Highways and Public Works, a copy or photostatic copy of which is hereto attached, and, therefore, as authorized by law to do, suit having been brought by the claimant, your petitioner pays said sum to the Clerk of the Court, by voucher or warrant No. ——, dated —— — ——, payable to the order of said Clerk for $——, drawn against the funds of said Department of Highways and Public Works, accompanying this petition, and your petitioner prays that the cause be dismissed as to him, this payment being in the nature of and for the purpose of an interpleader.'

(d) 'Such petition shall be signed by the Commissioner or the attorney for the Department of Highways and Public Works for him, and upon the filing of such petition ac- [fol. 156] companied by such payment the suit shall be dismissed as to the Commissioner as a matter of right, such sums so paid into Court, as to the plaintiff or claimant, standing in lieu and as a satisfaction of the contractor's bond and a fulfillment of the duties of the Department of Highways and Public Works to the claimant or plaintiff."

But, as we have held, the said Act of 1929 was not retroactive in its effect, and afford no authority to the Commissioner to make such payment to the contractor, National Construction Company.

It does not appear from the record that such payment to the National Construction Company was made with the consent or knowledge of the National Surety Company. Was the National Surety Company thereby discharged from liability on its bond?

The rule of strictissimi juris, applicable to an ordinary accommodation surety, is not available to a paid surety on a bond such as that here under consideration. The Courts regard such contract more in the nature of an insurance contract, and by analogy apply rules governing liability applicable to the latter class of contracts. L. & N. R. Co. v. U. S. F. & G. Co., 125 Tenn. 658, 148 S. W. 671; Hunter v. U. S. F. & G. Co., 129 Tenn, 572, 167 S. W. 692; Green v. U. S. F. & G. Co., 135 Tenn. 117, 185 S. W. 726; Cambria Coal Co. v. National Surety Co., 141 Tenn. 270, 209 S. W. 641; Rambo v. Naylor Engineering Co., 10 Tenn. App. 203, [fol. 157] 206; Couch on Insurance, Vol. 5, sec. 1189; Annotation, 12 ALR, p. 382 et seq.

But "the Court will not extend the contract beyond its import nor undertake to make any new contract for the parties" (Rambo v. Naylor Engineering Co., supra), and "this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties." Green v. Fidelity & Guaranty Co., 135 Tenn. 117, 122, 185 S. W. 726.

In such case, the plain intention of the parties cannot be "nullified by construction, or the sureties obligation extended by implication beyond the express terms of his contract." 5 Couch, supra, pp. 4263-4264. See also Annotation, 12 ALR, pp. 387-389, where cases illustrating the "qualification of the rule" are digested.

The provision of the Act of 1917, Chapter 74, hereinbefore quoted, which required the Commissioner to withhold a sufficient sum to pay all claims of which notice was filed with him etc., constituted a part of the contract and bond here in question (see authorities hereinbefore cited), and this provision was not for the benefit of laborers and furnishers of material and the Highway Department alone, but also enured to the benefit of the surety on the contractor's bond, and could not be changed to the prejudice of the surety without its consent. Fidelity & Deposit Co.

[fol. 158] v. Agnew, (C. C. A.), 152 Fed. 955; O'Neill v. Title Guaranty & Trust Co. (C. C. A.), 191 Fed. 570; Justice v. Empire State Surety Co., 209 Fed. 105, 108, and 218 Fed. 802; Joint School District v. Bailey-Marsh Co., 181 Wis. 202; Shelton v. American Surety Co. (U. S. Dist Ct.), 127 Fed. 736; First National Bank of Montgomery v. Fidelity & Deposit Company of Maryland (Ala.), 5 LRANS 418, and Case Note thereto appended.

(It should be observed that the case of Fidelity & Deposit Company v. Robertson, 136 Ala. 379, 34 Sou. 933, holding that such a provision in the contract was solely for the owner's benefit, and could be waived by him without prejudice to his rights against the surety, was expressly overruled by the later case of First Nat. Bank v. Fid. & Dep. Co., supra).

In Fidelity & Deposit Co. v. Agnew, supra, page 956, the U. S. Circuit Court of Appeals said:

"The purpose of such a stipulation is to guard against the consequences of a default, in case the principal contract becomes a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as holding out an incentive; and when it is not observed, and advance or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge [fol. 159] as a matter of law. (Citing authorities). This is too well established to be controverted, and the only question is how far it applies here." (The judgment of the District Court against the surety was reversed).

In the case of Joint School District v. Bailey-Marsh Co., supra, the Supreme Court of Wisconsin said:

"It is well settled that whenver a creditor has a right and opportunity to apply property of the principal to the satisfaction or security of his debt, he owes to the surety a duty to do so, and release or waiver of that right to the prejudice of the surety and without his consent will discharge the surety, at least pro tanto."

In that case the Court held that where a bond is given for a money consideration it has all the essential features of an insurance contract and is therefore not to be construed according to the rules of law applicable to the contract of an ordinary accommodation surety, but that the right to have the building fund applied to the completion of the building after the contractor's default and not diverted to the payment of the contractor's obligations to general creditors is one which may be asserted by a surety for compensation as well as by a gratuitous surety, and that, where there had been such diversion, the surety was discharged pro tanto.

[fol. 160] We think that the principles declared and applied in the Wisconsin case, just mentioned, are sound, and that their application to the facts of the present case results in a discharge of the appellant from liability on the bond executed by it as surety for National Construction Company.

The briefs and arguments in the instant case are largely devoted to a discussion of the construction and effect of Chapter 80 of the Public Acts of 1929, but, in the view we have taken of the case, this discussion is not relevant to the determinative question hereinbefore pointed out.

The Act of 1929, Chapter 80, has been construed and applied by our Supreme Court in several reported cases, viz: Equitable Casualty & Surety Co. v. Jackson, 163 Tenn. 54, 44 S. W. (2nd) 899; Moss Tie Co. v. Newsom, 164 Tenn. 515, 51 S. W. (2nd) 477; Petroleum Corporation v. McQuary, 164 Tenn. 646, 51 S. W. (2nd) 854; Standard Oil Company of La. v. Jamison Bros., Inc., 59 S. W. (2nd) 522; Campbell v. Cresap, 59 S. W. (2nd) 523; but it does not appear from the opinion in either of these cases that a bond executed prior to the passage of the Act was involved.

In the leading case of Southern Construction Co. v. Halliburton, 149 Tenn. 319, 258 S. W. 409, the Act of 1917, Chapter 74, was construed in many of its aspects, but the question presented in the instant case (relating to the construction and effect of Section 6 of that Act) was not dis-
[fol. 161] cussed or involved in the Halliburton case.

It results that the decree of the Chancellor granting a recovery in favor of complainant International Steel & Iron Company, and against appellant National Surety Company, for $58,593.71 and costs, is reversed, and the complainant's bill, as against National Surety Company, is dismissed, and a decree will be entered accordingly.

The costs of the appeal will be adjudged against the appellee International Steel & Iron Company and its sureties for costs.
Faw, P. J.

Judges Crownover and DeWitt concur.

[fol. 162] IN COURT OF APPEALS OF TENNESSEE

Davidson Equity
Rev. and Dis.

INTERNATIONAL STEEL & IRON COMPANY

vs.

NATIONAL CONSTRUCTION CO. ET AL.

DECREE—December 2, 1933

This cause came on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that decree of the Chancellor be reversed, and the bill dismissed as against the National Surety Company, and that the International Steel and Iron Co., principal and Louis Leftwich and Cecil Sims, surety, will pay the costs of this cause, for which let fi fa issue.

[fol. 163] IN SUPREME COURT OF TENNESSEE

ORDER ALLOWING CERTIORARI—May 19, 1934

The Court granted petitions for certiorari in the following cases, to wit:

International Steel and Iron Co. v. National Const. Co. et al., Davidson Eq. Both petitions Granted.

[fol. 164] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENTS OF ERROR IN BEHALF OF NATIONAL SURETY COMPANY—Filed Feb. 14, 1934

[fol. 165] I

The Court of Appeals erred in holding that the Act of 1929, Chapter 80, was inapplicable to the present controversy and in holding that the Commissioner of Highways and Public Works was not authorized to proceed under the provisions of said Act, on September 3, 1930, in making a final settlement to release the retainage and accept a proper refunding bond for the protection of unpaid claims of laborers and materialmen.

(Opinion, Court of Appeals, p. 16.)

II

The Court of Appeals erred in not directly sustaining petitioner's third assignment of error, viz:

"The Chancellor erred in not holding that the final settlement made by the Commissioner with the National Construction Company, on September 3, 1930, the release of the retainage, and the delivery of the bond in place of the retainage, and the delivery of the bond in Court in response to the suit thereon, was a fulfillment of the duties of the Commissioner and a satisfaction and discharge of the contractor's first bond on which the National Surety Company was surety."

(Opinion, Court of Appeals, p. 16.)

[fol. 166] [File endorsement omitted]

In Supreme Court of Tennessee

[Title omitted]

Assignments of Error in Behalf of International Steel and Iron Company—Filed Jan. 4, 1934

[fol. 167] The Court of Appeals erred in holding that the action of the Commissioner of Highways and Public Works in payment over to the National Construction Company the retained funds aggregating $77,069.82 on September 3, 1930, and taking a refunding bond released and discharged the National Surety Company as a general surety on said contractor's bond for all liability thereunder to furnishers of material and labor used in the building of said bridge, and in reversing the judgment of the Chancellor and dismissing the suit as to the defendant, National Surety Company.

[fol. 168] IN SUPREME COURT OF TENNESSEE

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 10, 1935

To the Clerk of the Supreme Court of Tennessee:

You are requested by appellant, International Steel and Iron Company, to incorporate in the transcript of the record in the above styled cause to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above styled cause upon petition of International Steel and Iron Company the following:

1. The opinion of the Supreme Court of Tennessee rendered April 6th, 1935, including dissenting opinion.
2. The final decree of the Supreme Court of Tennessee dated April 6th, 1935, and all subsequent orders giving their dates, relating to this case.
3. Petition for appeal to the Supreme Court of the United States and endorsements thereon.

[fol. 169] 4. Assignments of error accompanying said petition for appeal.

5. Statement of appellant as to jurisdiction of the Supreme Court of the United States as provided by Rule 12 of said Court.
6. Order allowing appeal.
7. Appeal bond and endorsements thereon.
8. Notice to counsel for appellee of the filing of appeal papers required by Rule 12, paragraph 2, Rules of the Supreme Court of the United States, including service, or acknowledgment of service.
9. Citation with acknowledgment of service thereon.
10. Original bill of International Steel and Iron Company filed in Chancery Court at Nashville, Tennessee, on September 12, 1930, and Exhibit A thereto.
11. Petition of R. H. Baker, Commissioner, filed in said cause in the Chancery Court at Nashville, Tennessee, on October 4, 1930, with Exhibits A, B and C thereto.
12. Answer and cross-bill of National Construction Company filed in said cause in the Chancery Court at Nashville, Tennessee, on May 19, 1931.
13. Answer of National Surety Company filed in said cause in Chancery Court at Nashville, Tennessee, on October 29, 1931.

14. Answer of International Steel and Iron Company to the cross-bill of National Construction Company filed in said cause in Chancery Court at Nashville, Tennessee, on [fol. 170] July 6, 1931.

15. Decree in said cause rendered by the Chancery Court at Nashville on January 27, 1932, in Minute Book 25, Page 297.

16. Decree in said cause rendered by the Chancery Court at Nashville on October 25, 1932, in Minute Book 26, Page 332.

17. Decree in said cause rendered by the Chancery Court at Nashville on November 18, 1932, in Minute Book 26, Page 404.

18. Assignments of error filed by National Surety Company in the Court of Appeals on March 23, 1933.

19. Appeal bond of National Surety Company filed December 16, 1932.

20. Opinion of the Court of Appeals filed December 2, 1933.

21. Minutes of the Court of Appeals containing its final decree, dated December 2, 1933.

22. Minutes of the Supreme Court of Tennessee granting the petition for certiorari dated the 19th day of May, 1934.

23. Assignments of error filed by National Surety Company in the Supreme Court of Tennessee on the 14th day of February, 1934.

24. Assignments of error filed by International Steel and Iron Company on the 4th day of January, 1934.

[fol. 171] 25. This præcipe.

26. Clerk's certificate and certificate of the Chief Justice of the Supreme Court of Tennessee.

International Steel and Iron Company, F. M. Bass, Louis Leftwich, by Cecil Sims, Counsel.

[File endorsement omitted.]

I, William Hume, Counsel for National Surety Company, appellee, acknowledge service of this præcipe on this June —, 1935. I agree that it embraces everything that need be transmitted from the Supreme Court of the State of Tennessee to the Supreme Court of the United States in this cause and I agree with counsel for appellant that all the record so transmitted should be printed.

William Hume, Counsel for Appellee.

[fol. 172] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 173] Judge's certificate to clerk omitted in printing.

[fol. 174] Clerk's certificate to judge omitted in printing.

[fol. 175] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 15, 1935

Comes now International Steel and Iron Company, appellant in the above styled cause, conformably to the Rules of the Supreme Court of the United States, and particularly Rule 13 thereof, and adopts its assignments of errors as the statement of the points to be relied upon.

And International Steel and Iron Company, appellant, further states that all the record as filed in this cause in the Supreme Court of the United States should be printed, including this statement.

This June 10th, 1935.

F. M. Bass, Louis Leftwich, Cecil Sims, Counsel for Appellant.

[fol. 176] I, William Hume, counsel for appellee, National Surety Company, acknowledge service of the above on this the 10th day of June, 1935, and I concur in the suggestion that the entire record as filed in the Supreme Court of the United States should be printed for the consideration of that Court.

William Hume, Counsel for Appellee.

[fol. 177] [File endorsement omitted.]

Endorsed on cover: File No. 39,806. Tennessee Supreme Court. Term No. 252. International Steel and Iron Company, Appellant, vs. National Surety Company. Filed July 15, 1935. Term No. 252 O. T. 1935.

LERK'S COPY.

Vol. II

SUPPLEMENTAL TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
APPELLANT,

vs.

NATIONAL SURETY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

FILED FEBRUARY 11, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
APPELLANT,

vs.

NATIONAL SURETY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

VOL. II.

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Judd & Detweiler (Inc.), Printers, Washington, D. C., February 19, 1936.

—7450 C

[fol. 1] [Caption omitted.]

[fol. 2] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE, AT NASHVILLE

CS:MW.

Davidson Equity.

INTERNATIONAL STEEL & IRON COMPANY

vs.

NATIONAL CONSTRUCTION COMPANY et al.

PETITION OF INTERNATIONAL STEEL & IRON COMPANY, FOR AMEDMENT OF OPINION, etc.—Filed Jan. 15, 1936

Comes International Steel & Iron Company, petitioner, and respectfully shows to the Court, as follows:

That this cause came to this Court from the Court of Appeals of the State of Tennessee, for the Middle District, upon the petition of National Surety Company and the petition of International Steel & Iron Company for writs of certiorari because of errors complained of in the holding of the Court of Appeals, both of which petitions were granted by this Court and jurisdiction was assumed by decree in Minute Book 37, page 258. That the cause was set down for oral argument by the Court and such argument was heard on the 14th day of May 1934, and thereupon the cause was taken under consideration by the Court. That after the case was taken under consideration the Supreme Court of Tennessee ordered and directed reargument upon [fol. 3] certain specific grounds mentioned and set out in the order for reargument, which was entered July 14, 1934, in Minute Book 37, page 306, which order is as follows:

"This cause is set down for reargument, particularly upon the constitutionality, construction and applicability of Chapter 80, Acts of 1929, and it is so ordered."

That in response to the foregoing order of the Court petitioner, International Steel & Iron Company, prepared and filed a brief in this cause on February 25, 1935, which brief set out the contentions of International Steel & Iron

Company with respect to each of the questions designated by the Court, and said brief is now a part of the record and the papers in the cause.

In said brief the petitioner expressly contended that Chapter 80 of the Acts of 1929, if construed by the Court to be retroactive and applicable, was invalid and in violation of Section 10 of Article I and also the Fourteenth Amendment of the Constitution of the United States of America. This insistence was set out and contained in said brief, as will appear from the records and papers in this cause, in the following words, to-wit:

"Federal Question Involved.

"If the Court should be of the opinion that the Legislature intended the Contract Surety to be released when a refunding bond is executed under the provisions of Chapter 80 of the Acts of 1929; and should further be of the opinion that the aforesaid Act is applicable to the case at bar, we submit that Chapter 80 of the Acts of 1929 would violate [fol. 4] Section 10, Article I, and the 14th Amendment of the Constitution of the United States.

"Section 10, Article I of the Constitution of the United States, provides as follows:

" 'No State shall enter — any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; Make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.'

"The foregoing provisions of the Federal Constitution have consistently been construed to prohibit a State from passing a Statute which takes away the right to enforce a contractual obligation made prior to the passage of the Statute. The right of enforcement includes also the means in existence at the time the contract was made.

" 'Whether such repeal was effectual to deprive him of the process prayed, depended upon the question whether the judgment was founded upon a contract, the obligation of which the State is prohibited from impairing. By the obligation of a contract is meant the means which at the time of its creation, the law affords for its enforcement.'

State of Louisiana v. Police Jury, etc., 111 U. S. 716, 28 L. E. 574.

"The restrictions imposed by the Federal Constitution, in the sections above referred to, are so universally accepted that we deem it unnecessary to quote further decisions in support of our position.

"If in the decision of this case the contingencies arise which make this question pertinent, we respectfully ask the Court to make an express decision with respect to this Federal question."

[fol. 5] That the cause was again set for oral argument and heard before this Court on the 25th day of February, 1935, and that in said oral argument this petitioner insisted and relied upon its foregoing contention with respect to the Federal question involved and urged upon the Court that said Chapter 80 of the Acts of 1929, if construed to be retroactive and applicable to the cause, would impair the obligation of the contract between the petitioner and National Surety Company and would violate Section 10 of Article I of the Constitution of the United States of America.

That this Court rendered its opinion in the cause on April 6, 1935, and that in so doing the Court announced from the bench that, in accordance with ~~the~~ request of counsel for International Steel & Iron Company, it had specifically considered and decided the Federal question involved in the cause, to-wit, the question of whether or not as construed and applied in the cause Chapter 80 of the Acts of 1929 was a violation of Section 10, Article I, of the Constitution of the United States, and that the Court had reached the conclusion that said Chapter 80 of the Acts of 1929 did not violate Section 10, Article I, of the Constitution of the United States of America.

That the petitioner, International Steel & Iron Company, has prayed an appeal to the Supreme Court of the United States for the purpose of having it review the decision of this Court with respect to said Federal question, and that [fol. 6] upon the filing of the record in the cause in the Supreme Court of the United States, National Surety Company filed a statement in opposition to jurisdiction, and said Supreme Court of the United States now has under consideration the question of whether or not it should take jurisdiction of said cause on appeal and said cause was set for oral argument in said United States Supreme Court on January 9, 1936, under an express reservation of the question of jurisdiction, said argument being limited to the question of jurisdiction.

At the hearing aforesaid the United States Supreme Court indicated a doubt as to the jurisdiction of that Court upon appeal for the reason that the written opinion of this Honorable Court, filed herein on April 6, 1935, omitted to state clearly and unequivocally the decision of this Court with respect to petitioner's contention upon the Federal question, it being suggested by the Supreme Court of the United States that this Court, after construing said Chapter 80 of the Acts of 1929 to be retroactive and applicable to the controversy, further held that such construction of Chapter 80 of the Acts of 1929 would not bring that statute into any "constitutional difficulty", and further stated that the "constitutional rights" of petitioner were not infringed, but that this Court omitted in its opinion to refer specifically to the claimed constitutional rights of petitioner under section 10 of Article I of the Constitution of the United States of America, so that as a result of said omission some doubt had arisen in the mind of the Supreme Court of the United States as to whether this Court had reference to the Constitution of the State of Tennessee or the Constitution of the United States of America.

[fol. 7] Your petitioner shows that ~~its~~ contention made in response to the order of reargument aforesaid was specifically that said Chapter 80 of the Acts of 1929, if held to be retroactive and applicable, was in violation of the petitioner's Federal rights, to-wit, those protected by the above mentioned section of the Constitution of the United States and that this Court did in fact expressly adjudicate said Federal question, and announced its decision thereon in open court at the time the opinion was rendered, and that the doubt which has arisen is the result of the omission on the part of the Court to specifically state in its written opinion that the constitutional question referred to was the one raised by the petitioner, to-wit, the alleged violation of Section 10, Article I, of the Constitution of the United States of America.

Petitioner avers that this Court did in fact consider and decide the specific question of whether or not said Chapter

80 of the Acts of 1929, as construed and applied by this Court in its opinion, was a violation of Section 10, Article I, of the Constitution of the United States and announced its decision upon said question orally from the bench, but that through inadvertence and oversight the written opinion of the Court filed in the cause omitted to specifically recite and state such consideration and decision of said Federal question.

Because of this situation and the doubt expressed by the Supreme Court of the United States upon argument on jurisdiction aforesaid, petitioner has moved the United States Supreme Court for a continuance and a postpone- [fol. 8] ment of the further consideration of the question of jurisdiction on the appeal in this cause in order that your petitioner might file this petition in this Court for an amendment, for a more specific statement, or a certification to show appropriately the basis of its determination of the cause, and to show that the Federal question was briefed and argued before this Court, and actually determined by this Court in this cause. Said Supreme Court of the United States granted said continuance and postponement and has allowed your petitioner a period of two weeks within which to apply to this Court for the purpose aforesaid with a view of having this Court amend its opinion aforesaid so as to contain a more specific statement showing that the Federal question above referred to was considered and decided by the Court in this cause and to certify its decision with respect to said Federal question so as to show that said Federal question was briefed and argued before this Court and actually determined by this Court in this cause.

Premises considered, your petitioner prays:

1st. That it may be allowed to file this petition in this cause for the purposes herein above set out.

2nd. That the opinion of this Court in this cause, rendered on April 6, 1935, be amended so as to specifically and unequivocally show that this Court ordered a reargument of the cause by the decree hereinabove referred to, and that one of the specific grounds upon which this Court directed re-argument to be made was the question arising under the [fol. 9] Constitution of the United States as aforesaid, and that in response to said order for reargument International Steel & Iron Company filed a brief expressly raising said Federal question and contending that said Chapter 80 of the Acts of 1929, if construed to be retroactive and applicable, would be in violation of said petitioner's rights under Section 10, Article I, of the Constitution of the United States of America; that said contention was argued and presented orally on behalf of said petitioner before this Court and that this Court in fact considered and decided said Federal question and was of opinion that said Chapter 80 of the Acts of 1929 was not a violation of the petitioner's constitutional rights under said Section 10, Article I, of the Constitution of the United States, and that an order be now entered by the Court in this cause correcting and remedying the errors growing out of the omission by this Court to clearly show its consideration and decision of the Federal question in its written opinion aforesaid, and amending said opinion for such purposes.

3rd. That this petition and all orders made in response thereto and all proceedings, including all orders made pursuant to the prayer hereof, be duly certified as required by law as a part of the record in this cause, to be filed in the pending appeal in the United States Supreme Court.

4th. That petitioner have such other, further and general relief as it may be entitled to under the equities of the cause.

International Steel & Iron Company, by Cecil Sims,
Louis Leftwich, Attorneys.

[fol. 10] *Duly sworn to by Louis Leftwich and Cecil Sims. Jurat omitted in printing.*

I accept service of the foregoing petition, on this 15 day of January, 1936.

Chas. C. Trabue, Attorney for National Surety Company.

[fol. 11] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ANSWER OF NATIONAL SURETY COMPANY TO PETITION FILED WITH THIS COURT IN THE ABOVE CASE ON JANUARY 15, 1936 —Filed Jan. 16, 1936

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Tennessee:

Respondent, for answer, respectfully represents:

I

The petitioner prays this court to amend its opinion rendered herein on April 6, 1935.

Respondent is advised that, if the opinion is a part of the record, and to the extent that it is a part of the record, it can only be revised upon an application for that purpose filed during the term at which the opinion was rendered (Tennessee Code 1932, sec. 8980), and that while clerical mistakes or mistakes apparent upon the face of the record may be thereafter corrected (Ib. sec. 8722), the amend-[fol. 12] ment here sought was neither clerical nor apparent on the face of the record.

There is nothing whatever in the record to show that complainant ever invoked the constitution of the United States. On the contrary, it had sued on the Act of 1929 and had claimed in the Chancery Court, Court of Appeals and in this Court that the Act was applicable to this case.

II

Respondent did not understand that the decision of this court was based solely on a constitutional question, whether state or federal. This court said in its opinion that the view that it took of the matter did not bring the Act of 1929 "into any constitutional difficulty.'

There was a statutory bond under the Act of 1917 and another statutory bond under the Act of 1929. This court held in effect that no one could recover on both bonds. That was a matter of interpretation and that holding was true whether the 1929 Act was applicable or not.

Complainant sued on both bonds, with notice, made explicitly in respondent's answer, that the taking of the later bond might operate to discharge the earlier bond. But complainant proceeded and got judgment on the 1929 statutory bond and received and appropriated a large sum of money under that bond, something under $40,000.

This court found and stated in its opinion that complainant had filed its claim "according to subsection (e) of chapter 80 of the Acts of 1929" and that it had sued on [fol. 13] the 1929 statutory bond and recovered from it some $40,000.

Since under the opinion of this court no claimant had the right to recover on both statutory bonds, and since complainant had exhausted the benefits of the 1929 statutory bond, it reasonably followed, as respondent believes, that there could be no recovery on the 1917 bond. Else complainant would be given greater rights than any litigant whose rights arose prior to the Act of 1929 or any litigant whose rights arose subsequent to the Act of 1929.

While this court did not in terms say that complainant could not sue and recover on the 1929 statutory bond and after doing so be heard at the end of the suit to say that that statute was inapplicable, respondent believed that the above statement and findings of this court were determinative of the applicability of the Act.

III

In the recent argument in the United States Supreme Court on January 9th that court asked counsel for complainant (appellant) when and where appellant had invoked the constitution of the United States.

Complainant had sued and recovered on the statutory bond under the Act of 1929 and had never claimed or indicated in any pleading or assignment of error that the Act was not applicable or that it impaired complainant's contract rights.

In the recent case of Lynch vs. New York ex rel. Pierson, 293 U. S., 52, the United States Supreme Court, in stating [fol. 14] that jurisdiction on appeal from a state court "cannot be founded on surmise", went on to say: "Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record."

An examination of the pleadings, assignments and briefs will show that the sole question in the case up to the time of complainant's second brief in this court was as to the interpretation of the 1929 Act. The right to claim that it was inapplicable was entirely personal and could be waived. Complainant had waived any right to object by suing on the Act and exhausting its benefits.

There is no reference in the petition, assignments of error and brief of complainant in this court (in all 53 pages) to any clause of the federal constitution. On the contrary, complainant was asserting the applicability of the 1929 Act, as (on page 52) where it is argued in conclusion that the Court of Appeals erred in holding that the Act of 1929 was not applicable to the case.

Since the 1929 amendatory act could have only one meaning, respondent believed that the consequence of the court's interpretation of that act was that the suing and recovery by complainant on the refunding bond precluded recovery on the bond under the 1917 Act.

IV

The history of the case in this court is this:

Both sides filed petitions for certiorari. There was no reference in the petitions, assignments and accompanying briefs to any constitutional question or to any claim or right under the state or federal constitution.

[fol. 15] On the contrary, complainant had sued and recovered on the Act of 1929.

There was an oral argument in this court in the spring of 1934. In the course of the argument it was suggested by one of the members of the court that respondent had not filed a petition for certiorari so as to entitle it to question the reasoning of the Court of Appeals. It was pointed out that respondent had filed such a petition.

Thereafter the court directed a re-argument and this was had in the spring of 1935.

In February, 1935, complainant filed a brief in this court for the first time suggesting that the Act of 1929 was not applicable to the case. This was four and a half years after complainant had filed its bill suing on the 1929 bond, and over two years after it had recovered on the 1929 statutory bond and collected the proceeds of it, and over a year after it had filed its assignment and brief in this court maintaining—as it had in the two lower courts—the applicability of the 1929 Act and arguing its interpretation.

Respondent understands the opinion of the court in this case as settling (a) that where only the 1917 Act is applicable recovery is on the contract bond, and (b) that where the 1929 amendatory act is applicable and a refunding bond is taken, recovery is on the refunding bond, and (c) that neither the original statute nor the amendatory statute nor the two of them together authorize a recovery on both bonds.

The interpretation of the acts was, of course, wholly [fol. 16] within the right and power of this court and did not involve any federal question.

If this court should think it proper to interpret its opinion, respondent respectfully asks the court to clarify its opinion as to whether a claimant may conformably with its opinion recover on the bond provided by the statute of 1929 and receive its proceeds, and then recover also on the bond provided by the statute of 1917 and receive its proceeds.

The judgment of this court was in fa-or of respondent. The appeal to the United States Supreme Court was after, as respondent believed, it was too late to ask this court for an interpretation of its opinion.

National Surety Company, by Trabue, Hume & Armistead, Solicitors.

Duly sworn to by Charles C. Trabue. Jurat omitted in printing.

[fol. 17] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER SUPPLEMENTING OPINION—Filed Feb. 3, 1936

This cause came on to be heard on this February 3, 1936, upon the entire record and more especially upon the petition of International Steel & Iron Company seeking an amendment to the opinion of this court heretofore filed on April 6, 1935, and the answer of parties adversely interested, upon consideration whereof it is ordered by the court that the statement following be recorded as supplementary to and part of its original opinion herein, filed herein on April 6, 1935, as aforesaid.

In stating in said opinion that chapter 80 of the Public Acts of Tennessee for the year 1929, as construed by the court, did not bring that Act into any "constitutional difficulties" or infringe any "constitutional rights" of this petitioner, this court intended to express the opinion that the said Act so construed did not impair the obligation of [fol. 18] contracts in violation of Section 20 of Article I of the Constitution of Tennessee and the contract clause of Section 10 of Article I of the Constitution of the United States and did not violate the law of the land clauses of Section 8 of Article I and Section 8 of Article XI of the Constitution of Tennessee and the due process clause of the Fourteenth Amendment to the Constitution of the United States—these constitutional objections having been interposed by petitioner to the construction given chapter 80 of the Acts of 1929 by this court.

[fol. 19] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION OF NATIONAL SURETY COMPANY FOR A REHEARING—
Filed Feb. 4, 1936

Respondent, National Surety Company, respectfully asks for a rehearing of this application for the following purpose:

The court in its response handed down on February 3, 1936, says—

"these constitutional objections having been interposed by petitioner to the construction given chapter 80 of the Acts of 1929 by this court."

We respectfully ask the court to add to its ruling so as to show when and where these constitutional questions were raised, since, as stated in our answer upon this application, the Supreme Court at Washington—

"asked counsel for complainant (appellant) when and where appellant had invoked the constitution of the United States."

Complainant's petition on this application asked this court to amend its opinion so as to show—

"that this court ordered a reargument of the cause * * * and that in response to said order for reargument International Steel & Iron Company filed a brief expressly raising said Federal question. * * *"

[fol. 20] Respondent respectfully asks that there be incorporated in the ruling of this court a statement to the following effect:

No federal question was raised by complainant in its assignment of error and brief in support thereof filed in this court in February, 1934, and that the time and manner in which complainant raised the federal question was in a second brief filed by it in this court in February, 1935.

If the above statement is in any respect not correct, respondent asks that the court incorporate a correct statement showing when and where the federal question was raised.

If the order of this court is to be certified to Washington, respondent asks that the pleadings upon this application be included in the record.

National Surety Company, by Trabue, Hume & Armistead, Solicitors.

Duly sworn to by Charles C. Trabue. Jurat omitted in printing.

I have handed Mr. Sims a copy of this petition.

Chas. C. Trabue.

[fol. 21] [File endorsement omitted.]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER FURTHER SUPPLEMENTING OPINION—Filed Feb. 6, 1936.

This cause came on to be further heard on this February 6, 1936, upon the petition of National Surety Company that the court amplify the order herein made on February 3, 1936, so as to show when and where the constitutional questions, referred to in said order of February 3, 1936, were raised upon the hearing of this cause. Notice of this petition having been given to parties adversely interested, upon consideration of the same, the court adds the following as further supplement to and a part of its original opinion filed herein April 6, 1935.

On the first hearing of this cause in this court, all of the judges were not present. Those present were not agreed as to the proper disposition of the matter. The case was accordingly set down for re-argument. The Court of Appeals had held that chapter 80 of the Acts of 1929 was inapplicable to the controversy but had decided the case ad-[fol. 22] versely to the International Steel & Iron Company on other grounds. By order of this court this cause was set down for re-argument upon "the constitutionality, construction and applicability" of chapter 80 of the Acts of 1929. Prior to the re-argument counsel for International Steel & Iron Company filed a second brief in this court raising the constitutional questions referred to in the previous order of February 3, 1936, against the construction adopted by this court of chapter 80 of the Acts of 1929. The assignments of error and brief accompanying the petition for certiorari filed in this court by International Steel & Iron Company to review the action of the Court of Appeals did not raise any federal question.

Upon petition of counsel for National Surety Company it is ordered that "the pleadings upon this application" to amend the original opinion of this court be included in the transcript of the record for the Supreme Court of the United States.

[fol. 23] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 24] Judge's certificate to clerk omitted in printing.

[fol. 25] Clerk's certificate to judge omitted in printing.

[fol. 26] [File endorsement omitted.]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,
vs.
NATIONAL SURETY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT AS TO JURISDICTION.

F. M. Bass,
Louis Leftwich,
Cecil Sims,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,
vs.
NATIONAL SURETY COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

STATEMENT BY APPELLANT TO COMPLY WITH RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

May It Please the Court:

This is a suit filed in the Chancery Court of Davidson County, Tennessee, by International Steel and Iron Company against National Construction Company, National Surety Company, R. H. Baker, Commissioner of Highways and Public Works of the State of Tennessee, and Equitable Casualty and Surety Company, in which appellant sought a judgment against all of the defendants (except R. H. Baker, Commissioner, whom the statutes required to be made a defendant) for labor and materials furnished by appellant to National Construction Company and used in the construction of a certain bridge across the Tennessee River, which bridge was constructed under contract dated March 12, 1928, between National Construction Company and the State of Tennessee, on which contract National Surety Company became surety in accordance with the requirements of the statutes of the State of Tennessee. Appellant furnished the labor and materials under a special contract with National Construction Company, dated March 22, 1928, and upon the completion of the bridge National Construction Company was indebted to appellant in the sum of Fifty-Nine Thousand, Eight Hundred Thirty-Three and 71/100 ($59,833.71) Dollars. The Comissioner of Highways and Public Works had retained as required by statute ten per cent of the funds due from the State to National Construction Company, which amount was ample to satisfy appellant's claim, and after appellant had filed and perfected its claim against National Construction Company and its surety, National Surety Company, all of the funds held by the Highway Commissioner were paid over to National Construction Company without appellant's knowledge or consent, pursuant to Chapter 80 of the 1929 Public Acts of Tennessee, which was adopted by the General Assembly of Tennessee on April 10, 1929, more than a year after the making of the contract between appellant and National Construction Company. In paying over said retained funds the Highway Commissioner took a refunding bond as provided in said Chapter 80 of the 1929 Public Acts of Tennessee, which refunding bond was executed by National Construction Company and Equitable Casualty and Surety Company, as surety.

In the Chancery Court of Davidson County, T[illegible]ssee, appellant sought a recovery for the amount of its indebtedness against National Construction Company, the contractor; National Surety Company, surety on its contract, and Equitable Casualty Surety Company, as surety on the refunding bond. During the course of the litigation, Equitable Casualty and Surety Company became insolvent and Consolidated Indemnity and Insurance Company was substituted in its place and stead by consent, without prejudice, to the extent of Forty Thousand ($40,000.00) Dollars. A judgment was rendered in said Chancery Court in favor of appellant for the full amount of its indebtedness against National Construction Company and its surety, National Surety Company, and against Consolidated Indemnity and Insurance Company, to the extent of Forty Thousand ($40,000.00) Dollars. None of the defendants appealed except National Surety Company, which appealed to the Middle Division of the Tennessee Court of Appeals at Nashville.

On said appeal National Surety Company insisted that, under the provisions of said Chapter 80 of the 1929 Public Acts of Tennessee, it was released from the obligation of its contract as surety for National Construction Company by the payment of the retained funds by the Highway Commissioner to the general contractor, it being insisted that said act was applicable to the pre-existing contract of appellant and that its intent and effect was to release and relieve said National Surety Company as general contract surety from any and all further liability on claims for labor and materials against the principal contractor. This insistence was disallowed by the Court of Appeals, which held that said Chapter 80 of the 1929 Public Acts of Tennessee was not retroactive and was not applicable to the contract involved in this cause. Said court, however, further held that said National Surety Company was released from all liability as a matter of law by reason of the unwarranted act of the Highway Commissioner in paying over said retained funds to the principal contractor without the knowledge and consent of said surety. International Steel and Iron Company and National Surety Company both applied for writ of certiorari to the Supreme Court of Tennessee by proper petition, and such writ was granted to both parties, and the Supreme Court of Tennessee assumed entire jurisdiction of the cause.

National Surety Company assigned errors in the Supreme Court of Tennessee to the holding of the Court of Appeals to the effect that said Chapter 80 of the 1929 Public Acts of Tennessee was not retroactive and was merely prospective and therefore did not apply to the instant case, and International Steel and Iron Company, in opposition to such assignments, insisted that if said statute was given a retroactive effect and was construed to provide for a release of the general contract surety, such act would then be unconstitutional and void as respects appellant's rights in the present case, in that it would violate Section 10, Article 1, of the Constitution of the United States because it would impair the obligation of appellant's preexisting contract and destroy the substantial remedies enforceable by law at the time said contract was made.

The Supreme Court of Tennessee in its final opinion and decree, dated April 6th, 1935, for the first time in this litigation, construed said Chapter 80 of the 1929 Public Acts of Tennessee as releasing the general contract surety upon the payment of the retained funds to the general contractor, and his executing a refunding bond in accordance with the requirements of said statute, and further held that said statute was retroactive and applicable to the pre-existing contract between appellant and National Construction Company at the time said contract was made.

The rights and obligations of the respective parties, at the time the contract was made on March 22, 1928, were governed by the provisions of Chapter 74 of the 1917 Public

Acts of Tennessee, under which National Surety Company was especially and expressly obligated by contract for the full payment for all materials purchased and for all labor employed in the construction of the bridge. Under said statute the Commissioner of Highways was required to retain for appellant's express benefit ten per cent of all funds due the general contractor, and was required to hold said funds for appellant's benefit in the event of litigation. The effect of Chapter 80 of the 1929 Public Acts of Tennessee, as construed by the Supreme Court of Tennessee in this cause, was to destroy and release the foregoing obligation of National Surety Company to pay appellant for its materials and labor and also to destroy and impair the existing rights of appellant in and to the retained funds which were amply sufficient in this cause to satisfy said claim.

The Supreme Court of Tennessee in its said final opinion dismissed appellant's suit against National Surety Company, appellee, by applying the provisions of said Chapter 80 of the 1929 Public Acts of Tennessee, notwithstanding its passage after the contract rights of the parties were fixed under pre-existing statutes. This was a final judgment of the highest court of Tennessee, and from that judgment appellant has seasonably perfected its appeal to the Supreme Court of the United States.

A.

Federal Statutes Sustaining Jurisdiction.

The judgment sought to be reversed is a final one by the highest court in Tennessee, in which said court expressly held a State statute to be consistent with the Federal Constitution. This act of the Supreme Court was done unexpectedly at the end of the proceeding when appellant no longer had any right to add to the record.

Jurisdiction of the Supreme Court of the United States to review this cause is provided for by Section 237(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 344). The following cases seem clearly to support the claim of jurisdiction:

Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398.

Western & Atlantic Railroad v. *Henderson,* 279 U. S. 639.

Nashville, Chattanooga & St. Louis Railway v. *White,* 278 U. S. 456.

Saunders v. *Shaw,* 244 U. S. 317.

If for any reason appeal should not be considered the appropriate procedure, then appellant respectfully requests that its appeal be considered as an application for a writ of certiorari, as authorized by paragraph (c) of said Section 237 of the Judicial Code (28 U. S. C. A., Section 344).

B.

Tennessee Statutes, the Validity of Which is Here Involved.

The only question in this cause is the validity of Chapter 80 of the 1929 Public Acts of Tennessee, as construed and applied to appellant in this cause by the Supreme Court of Tennessee. Said Act is an amendment to Chapter 74 of the 1917 Public Acts of Tennessee, and in order to comprehend the change effected by the Act in question, it will be necessary to first set out the pertinent provisions of said Act of 1917. Chapter 74 of the 1917 Public Acts of Tennessee is a general act providing for revenue in road building and provides a detailed method for the letting of contracts for the construction of highways and bridges upon sealed bids, and the making of contracts between the successful bidder and the State of Tennessee. It was in full force and effect in Tennessee at the time the contract for the construction of the bridge was entered into between the State of Tennessee and National Construction Company on March 12, 1928; and also on March 22, 1928, at the time appellant entered into its contract with National Construction Company to furnish the labor and materials involved in this controversy.

Section 6 of said Chapter 74 of the 1917 Public Acts of Tennessee provides:

> "All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work. This bond must be approved by the Department and filed with its records. The contract shall provide that the work executed thereunder shall be subject to the inspection, approval, and acceptance of the State Highway Engineer or his assistant engineer acting on oath and under bond. Not more than ninety per cent of the contract price shall be paid on any contract until it is completed and the work is accepted. Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his sub-contractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days notice in some newspaper published in the county where the work is done, if there be a newspaper published there, and if not, in a newspaper in an adjoining county, that settlement is about to the made and notify all claimants to file notice of their claim with the Secretary of the Department. *The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their*

claims against the contractor or his agent, in some court of competent jurisdiction.''

Chapter 80 of the 1929 Public Acts of Tennessee was passed by the General Assembly of Tennessee on April 10, 1929, and became effective on April 11, 1929, when it was approved by the Governor. Said Act struck out of the previous law that portion which is in italics and substituted in lieu thereof the following provisions:

> ''The Secretary of the Department (now the Commissioner of Highways and Public Works) shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow claimants to sue and prove their claims against the contractor or his agent, in some court of competent jurisdiction. In the event suit is brought against the contractor within the said sixty days from the date of the last advertising, by any claimant, the Department or its officer shall pay the amount of said claim into court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.
>
> ''On the date set for full and final settlement with the contractor, the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission, whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full.
>
> ''All suits against contractors brought by any claimant shall make the Commissioner of Highways and Public Works a defendant thereto and, except where the same be for sums within the jurisdiction of a Justice of the Peace, shall be brought in the county where the main office of the Department of Highways and Public Works is situated. On any such suit being brought the sums then withheld may be paid into court,

as above provided, by simple petition of the Commissioner which may be substantially as follows:

" 'Your petitioner, the Commissioner of Highways and Public Works, respectfully represents that under Chapter 74 of the Public Acts of 1917, and acts amendatory thereof, he has retained from (here insert name of contractor) on final estimate or settlement, $——, equal in amount to the claim of (here insert name of claimant), as the same was filed and presented to the Department of Highways and Public Works, a copy or photostatic copy of which is hereto attached, and, therefore, as authorized by law to do, suit having been brought by the claimant, your petitioner pays said sum to the Clerk of the court, by voucher or warrant No.—— dated ——, payable to the order of said Clerk for $——, drawn against the funds of said Department of Highways and Public Works, accompanying this petition, and your petitioner prays that the cause be dismissed as to him, this payment being in the nature of and for the purpose of an interpleader.'

"Such petition shall be signed by the Commissioner or the attorney for the Department of Highways and Public Works for him, and upon the filing of such petition accompanied by such payment the suit shall be dismissed as to the Commissioner as a matter of right, such sum so paid into court, as to the plaintiff or claimant, standing in lieu and as a satisfaction of the contractor's bond and a fulfillment of the duties of the Department of Highways and Public Works to the claimant or plaintiff."

C.

Date of Judgment Sought to be Reviewed and the Date Upon Which Application for Appeal was Presented.

The final judgment in the Supreme Court of Tennessee, which appellant seeks to have reviewed in this cause, was entered April 6, 1935. The application for appeal to the

United States Supreme Court was presented to the Chief Justice of the Supreme Court of Tennessee and allowed on June 10, 1935.

D.

Nature of the Case and Rulings of the Court Below.

Under the Tennessee Statutes in force on March 22, 1928, at the time appellant entered into its contract with National Construction Company, the appellee, National Surety Company, had become surety for the general contractor and had executed its bond in an amount fixed by the Highway Department, conditioned upon the full and faithful performance of every part and stipulation of the contract between National Construction Company and the State of Tennessee, and especially the payment for all materials purchased and all labor employed in the contemplated work. Said National Surety Company became directly obligated under its contract to appellant and guaranteed to it the full payment for all materials purchased and labor employed in the work under the contract between appellant and National Construction Company.

Also under said existing statute the Highway Department was required, upon completion of the work and the filing of claims, to withhold from the contractor a sufficient sum to pay all claims for labor and materials, and upon suit being filed within a reasonable time such funds would be subjected to the satisfaction of such claims.

Chapter 80 of the 1929 Public Acts of Tennessee, as construed by the Supreme Court of Tennessee in this case, altered and amended said existing statute in two material respects:

(a) It permitted the funds retained by the Highway Commissioner for the satisfaction of claims for labor and materials to be paid over to the general contractor without the consent of claimants, and thereby impaired and destroyed such claimants' rights in and to said fund, and its right to have said fund subjected to the satisfaction of the claim.

(b) It released and discharged the general surety on the contractor's bond where the retained funds were paid over to the general contractor upon his executing a refunding bond without the consent of the claimant and thereby destroyed the obligation of the contract previously existing between the contract surety and appellant, on the strength of which contract appellant furnished the labor and materials to the general contractor.

It is submitted that the foregoing ruling of the Supreme Court of Tennessee, in holding that said Chapter 80 of the 1929 Public Acts of Tennessee was retroactive and applicable to appellant's rights and sufficient to deprive appellant of the obligation of its pre-existing contract with National Surety Company and all its right to enforce satisfaction of its claim against the retained funds held by the Highway Commissioner, was such as to bring the case within the jurisdictional provision herein relied on, and the following cases are believed to sustain the jurisdiction of this Court:

Sturgis v. *Crowninshield,* 4 Wheat. pp. 197, 198.
Ogden v. *Saunders,* 12 Wheat. 213.
State of Louisiana v. *Police Jury, etc.,* 111 U. S. 716.
Worthen v. *Thomas,* 292 U. S. pp. 431.
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Western & Atlantic Railroad v. *Henderson,* 279 U. S. 639.

Nashville, Chattanooga & St. Louis Railway v. *White*, 278 U. S. 456.

Saunders v. *Shaw*, 244 U. S. 317.

Copy of this statement has been served upon adversary counsel in the manner provided by the rules of the United States Supreme Court.

Respectfully submitted,

F. M. Bass,
Louis Leftwich,
Cecil Sims,
Counsel for Appellant.

June 10, 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,
vs.
NATIONAL SURETY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT AS TO JURISDICTION.

F. M. BASS,
LOUIS LEFTWICH,
CECIL SIMS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

Appellee's reply brief as to jurisdiction discusses two questions, neither of which applies to or affects the question of jurisdiction of this Court upon appeal.

It is first stated that appellant is estopped now to question the validity of Chapter 80 of the 1929 Public Acts of Tennessee. It is contended that appellant's action in suing both the original contract surety and the surety on the refunding bond was a recognition of the validity of the statute complained of. There is no merit in the contention if considered from the standpoint of a defense, and certainly the contention is without merit upon the question of jurisdiction. This brief is necessarily confined to the question of jurisdiction.

The Supreme Court of Tennessee did not rest its opinion in whole or in part upon the question of estoppel but predicated it solely and entirely upon the constitutionality of the State statute in question. The question of estoppel was not raised in appellee's assignments of error in the Supreme Court of Tennessee, and therefore was not considered by that court.

Under these circumstances upon the question of jurisdiction, the following cases are controlling:

Henderson Bridge Company v. *Henderson,* 173 U. S. 592;

Grayson v. *Harris,* 267 U. S. 352.

In the case of *Henderson Bridge Company* v. *Henderson,* 173 U. S. 592, the Court of Appeals of Kentucky expressly waived any decision upon a plea of *res adjudicata* and based its opinion upon the constitutional question involved. It was urged in opposition to the jurisdiction of this Court that the plea of *res adjudicata* was good and should have been sustained by the Court of Appeals of Kentucky, and hence this Court was without jurisdiction.

This Court held otherwise, Mr. Justice Harlan saying in the opinion:

> "Upon examining the opinion of the Court of Appeals of Kentucky in this case we find that that court expressly waived any decision upon the plea of *res judicata* for the reason that some views were then pressed upon its attention that had not been presented in previous cases, and it reconsidered and discussed the main question suggested by the defense, namely, that the Constitution of the United States forbade the assessment of that part of the bridge property between low-water mark on the Kentucky shore and low-

> water mark on the Indiana shore of the Ohio river. This Court therefore has jurisdiction to review the final judgment of the State court for the purpose of ascertaining whether it deprived the defendant of any right, privilege, or immunity specially set up by them under that instrument."
>
> *Henderson Bridge Company* v. *Henderson,* 173 U. S. at page 609.

In *Grayson* v. *Harris,* 267 U. S. 352, the non-Federal question involved was a defense of the statute of limitations, which was ignored in the decision of the Supreme Court of Oklahoma. The validity of this non-Federal defense was asserted in opposition to jurisdiction of this Court upon appeal. This Court held that it had jurisdiction. We quote from the opinion by Mr. Justice Sutherland as follows:

> "Nor need we inquire into the defense of the Statute of Limitations. The decision now under review entirely ignores it. The rule that, when the decision of a State court may rest upon a non-Federal ground adequate to support it, this Court will not take jurisdiction to determine the Federal question, has no application where, as here, the non-Federal ground might have been considered by the State court, but was not. *Rogers* v. *Hennepin County,* 240 U. S. 184, 188, 189, 60 L. Ed. 594, 597, 598, 36 Sup. Ct. Rep. 265; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 608, 43 L. Ed. 823, 829, 19 Sup. Ct. Rep. 552.
>
> *Grayson* v. *Harris,* 267 U. S. at page 358.

The non-Federal question of estoppel asserted by appellee in this case was not raised by its assignments of error in the Supreme Court of Tennessee, was not considered by the Supreme Court of Tennessee and was not in whole or in part the basis of the decision. The decision rested solely and alone upon the constitutionality of the statute.

This Court therefore manifestly has jurisdiction on appeal.

The other question asserted in appellee's statement on jurisdiction involves a discussion of the *merits* of the constitutional question. It is contended that the statute in question is constitutional because it affects only the remedy and does not impair the obligation of the contract. This contention is unsound for a number of reasons, but since these questions pertain solely to the merits of the case rather than to the question of jurisdiction, we will treat this contention in our subsequent brief on the merits, as we deem it improper to reply thereto in a brief directed solely to the jurisdiction in accordance with the rules of this Court.

Respectfully submitted,

F. M. Bass,
Louis Leftwich,
Cecil Sims,
Counsel for Appellant.

I acknowledge receipt of copy of the above brief this July 12, 1935.

William Hume,
Counsel for Appellee.

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In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

BRIEF ON BEHALF OF INTERNATIONAL STEEL AND IRON COMPANY, APPELLANT.

ISIDOR KAHN,
LOUIS LEFTWICH,
CECIL SIMS,
Counsel for Appellant.

F. M. BASS,
Of Counsel.

BAIRD-WARD—NASHVILLE

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In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

BRIEF ON BEHALF OF INTERNATIONAL STEEL AND IRON COMPANY, APPELLANT.

May it Please the Court:

Jurisdiction.

Appellant has heretofore filed a separate statement as to jurisdiction, setting out the date of the judgment to be reviewed, the specific claims advanced, and rulings made in the lower court which are relied upon as the basis of this court's jurisdiction, a definite reference to the statutory provisions under which jurisdiction is invoked, and a reference to cases believed to sustain the jurisdiction, in compliance with Rule 12 of this court.

STATEMENT OF THE CASE.

Pleadings.

International Steel & Iron Company filed its original bill in the Chancery Court of Davidson County, Tennessee, on September 12, 1930, against National Construction Company, a contractor, National Surety Company (appellee) as surety on the contractor's bond, R. H. Baker, Commissioner of Highways and Public Works of the State of Tennessee (a formal party), and Equitable Casualty & Surety Company, as surety on the contractors refunding bond, seeking to recover a balance of $59,833.71 due appellant for labor and material furnished the contractor in the construction of a certain highway bridge at Perryville, Tennessee. (R., 13.)

The facts material to this appeal are set out in the original bill and are without dispute. On March 12, 1928, National Construction Company entered into a contract with the State of Tennessee, through its Department of Highways & Public Works, for the construction of a certain bridge across the Tennessee River known as the Perryville Bridge, and entered into a certain bond also dated March 12, 1928, on which bond appellee National Surety Company became surety. Under this bond National Construction Company as principal and National Surety Company as surety expressly guaranteed the payment on the part of the principal contractor for all materials, supplies and labor furnished and used in the construction of said bridge, said bond having been made pursuant to the then existing Statutes of the State of Tennessee (Section 6, Chapter 74 of the 1917 Public Acts of Tennessee), and being expressly for the benefit of such parties as furnished materials, supplies and labor to said contractor in the construction of said bridge. (R., 15.) The pertinent sections of this statute, as well as those of the subsequent statute known as Chapter 80 of the 1929 Public Acts of Tennessee, are set out in the appendix. The appellant seeks to hold the appellee liable as surety on this bond, having entered into a contract with National Construction Company, the contractor, ten days thereafter to furnish certain labor and materials in the construction of the bridge.

National Construction Company filed an answer admitting the execution of the bond with National Surety Company as surety, but denied all indebtedness to the International Steel & Iron Company upon grounds which are not now material. (R., 27.) National Surety Company filed an answer admitting that it became surety on the bond on behalf of National Construction Company as principal, and that such bond was executed on March 12, 1928, and was conditioned as required by law in such cases. (R., 31.) In its answer National Surety Company further averred that it was informed that its principal denied the amount of the claimed indebtedness, and the answer further set out the fact that the Highway Commissioner had retained from the sums due the contractor an amount more than sufficient to pay the claim but had released these funds to the contractor upon its execution of a refunding bond with surety thereon, and that by reason of this latter transaction it had been released and relieved of all of its original liability as surety on the contractor's bond. (R., 32.)

The Supreme Court of Tennessee, in its opinion filed April 6, 1935, defined the obligation of the bond executed by National Surety Company as follows:

> "In March, 1928, the National Construction Company entered into a contract with the Highway Commissioner to build for the State a bridge over the Tennessee River at Perryville. As required by chapter 74 of the Acts of 1917, the Commissioner took a bond from the contractor with the National Surety Company as surety. This bond was conditioned, following the statute, 'upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work.' " (R., 1.)

R. H. Baker, the Highway Commissioner, and nominal defendant, filed an intervening petition reciting in substance that International Steel & Iron Company had duly filed its claim with the Department of Highways & Public Works for materials, supplies and labor furnished and used in the construction of the bridge and that sufficient cash funds had been retained from the amount due to National Construction Company, the contractor, with which to pay and satisfy the claim, but that all of these funds had been released and paid over to the contractor pursuant to a subsequent statute known as Chapter 80 of the Acts of 1929 upon the execution of a refunding bond by the National Construction Company as principal, and the defendant Equitable Casualty & Surety Company as surety, which bond was tendered into court. (R., 18-21.)

International Steel & Iron Company prayed the court for a judgment for the amount of its debt against National Construction Company upon its contract, National Surety Company as surety upon the contract, and Equitable Casualty & Surety Company as surety upon the refunding bond. (R., 17.)

Decision of the Chancery Court.

After the taking of proof and upon the hearing, the Chancellor rendered an opinion adjudging National Construction Company to be justly indebted to the International Steel & Iron Company in the sum of $58,593.71 for materials furnished and used in the construction of the bridge, and rendered judgment on said indebtedness against National Construction Company, and National Surety Company as surety on the bond. During the progress of the litigation Equitable Casualty & Surety Company had become insolvent and by consent decree (without prejudice) Consolidated Indemnity & Insurance Company had been substituted as surety on the refunding bond to the extent of $40,000.00. (R., 34-36.) Judgment was entered against this latter refunding surety for the amount of its bond and the

Chancellor directed that any amount recovered from the substitute surety on the refunding bond be credited upon the judgment rendered against the contractor and National Surety Company as surety on its contract. (R., 43-44.)

With respect to the defense of National Surety Company that it had been released by the payment of the retained funds to the contractor and the acceptance of a refunding bond, the Chancellor held:

> "The contractor's bond protects the claimants and was executed for their benefit as much as for the benefit of the State, and they cannot be deprived of that protection by the joint act of the principal thereon, and the obligee, the State, and this is true whether the refunding bond was taken within or without statutory authority. As to the surety, the National Surety Company, the contractor's bond is in law not to be treated as performed until complainant's claim is paid, its payment being a condition of the bond. This liability has not been discharged." (R., 38.)

No appeal was perfected by National Construction Company, the contractor, or Consolidated Indemnity & Insurance Company, the substituted surety on the refunding bond, and the decree became final with respect to these two parties. National Surety Company perfected an appeal to the Court of Appeals of Tennessee and assigned errors. (R., 45.)

Decision of the Court of Appeals of Tennessee.

The decision of the Court of Appeals of Tennessee, as set out in its opinion filed December 2, 1933, may be summarized as follows:

(a) The court first held that Chapter 80 of the 1929 Public Acts of Tennessee was not applicable to the present controversy because the contract and bond in question was executed on March 12, 1928, whereas the aforesaid Act was not passed until a subsequent date in the year 1929, and was prospective only, and, therefore, would not be given a retroactive effect. The court held that the rights of the parties were to be determined under the provisions of Chapter 74 of the 1917 Public Acts of Tennessee, this being the applicable statute in effect at the time the contract was made. (R., 61.)

(b) The court further held that the action of the Highway Commissioner in releasing the retained funds to the contractor, and accepting the refunding bond, apparently upon the assumption that he was authorized so to do by Chapter 80 of the 1929 Public Acts of Tennessee, was wholly unauthorized, and that this unauthorized act of the Highway Commissioner, done without the consent of National Surety Company as surety on the contractor's bond, had the legal effect of releasing the surety from further liability. (R., 67.)

The Court of Appeals of Tennessee therefore reversed the holding of the Chancellor and dismissed complainant's action against National Surety Company. (R., 68.)

Decision of the Supreme Court of Tennessee.

International Steel & Iron Company and National Surety Company both applied to the Supreme Court of Tennessee for the writ of *certiorari*, which was granted on both applications, and both parties assigned error to the foregoing action of the Court of Appeals of Tennessee. (R., 68-69.)

In the Supreme Court of Tennessee the National Surety Company contended that Chapter 80 of the 1929 Public Acts of Tennessee, enacted subsequently to the execution of the surety bond, was applicable and that the Court of Appeals erred in holding to the contrary, the Surety Company contending that the Highway Commissioner acted rightfully in releasing the retained funds and taking the refunding bond, and that the legal effect of such action was to satisfy and release the obligation of its surety bond.

(R., 68.) International Steel & Iron Company contended that Chapter 80 of the 1929 Public Acts of Tennessee was not applicable to the controversy for the reasons stated by the Court of Appeals, but assigned as error the action of the court in holding that National Surety Company had been released by the foregoing action of the Commissioner of Highways & Public Works. (R., 69.)

The Supreme Court of Tennessee by a majority opinion affirmed the decision of the Court of Appeals of Tennessee but upon *wholly different grounds,* and upon a contrary line of reasoning. The holding of the Supreme Court of Tennessee may be summarized as follows:

(a) The court held that Chapter 80 of the 1929 Public Acts of Tennessee was applicable to the controversy even though it was not passed until after the contract had been made, and construed said Act from its language and purpose to be retroactive. The court, therefore, held that the Highway Commissioner acted properly and pursuant to the applicable statute in paying over the retained funds to the contractor upon the execution of the refunding bond. (R., 5-6.) We quote from the opinion:

> "We construe the statute as regulating, after its passage, the procedure to be followed by all parties in respect to the final settlement of every highway contract, whether the contract itself was made before or after the enactment of Chapter 80 of the Acts of 1929." (R., 5.)

(b) The court held that under the provisions of Chapter 80 of the 1929 Public Acts of Tennessee the intent and effect of the release of the retainage by the Highway Commissioner upon the execution of a refunding bond was to release and discharge the contractual obligation of the National Surety Company as surety on the contractor's bond. The court said:

> "It must have been contemplated that the release of the retainage by the Highway Commissioner, either

> under (a) or under (b)—the retainage being adequate to cover litigated claims—would discharge the surety on the contract bond from liability to laborers and materialmen. Otherwise the validity of (a) and (b) could scarcely be sustained. . . . The surety's rights with respect to the retainage, being contract rights, could not be taken away unless adequate security was substituted for the retainage and the Act of 1929 offers no such substitute to the contract surety." (R., 4.)

The Court held that the rights of appellant as a furnisher of materials under Chapter 74 of the 1917 Public Acts of Tennessee against the retained funds and the surety on the contractor's bond was in the nature of a remedy, and that the subsequent Acts of 1929 substituted for the original liability of the surety and in lieu of the retainage an indemnity or refunding bond which ordinarily would be as good protection as the contractual obligation of the original surety, and the claim against the retained funds. The court concluded, therefore, that the release of the obligation of the National Surety Company's contract without the consent of appellant, pursuant to a statute passed after the contract had been made, affected only the remedy and, therefore, violated no constitutional rights. The court summarized its holding as follows:

> "By the Act of 1917 complainant Steel Company was given recourse on the retainage and on the contract bond to secure its rights arising under its engagement with the general contractor. For these remedies the Act of 1929 substituted recourse on an indemnity or refunding bond. . . . The protection offered by one bond would ordinarily be as good as the protection offered by the other. As a rule, bonds from surety companies are taken." (R., 7-8.)

Dissenting Opinion of Justice McKinney.

Justice McKinney filed a dissenting opinion, pointing out that the decision of the majority of the court had the effect of impairing and destroying the obligation of a pre-existing contract by subsequent legislation, and, therefore, rendered the legislation unconstitutional. We quote from the dissenting opinion of Justice McKinney as follows:

> "I concur with the Chancellor and the Court of Appeals in holding that the Act of 1929 should be construed as prospective; otherwise it would be unconstitutional as impairing the obligation of a contract. Upon the strength of the bond executed by the National Surety Company complainant furnished steel of the value of $135,000. Under the majority opinion the legislature can destroy this obligation by authorizing the Commissioner of Highways to substitute other security, which, as in this cause, was worthless, and upon which complainant might not have been willing to furnish this large quantity of material. This, in my opinion, extends the rule of remedies further than is justified under elemental principles of contract. The National Surety Company, for a paid consideration, said to complainant if you will furnish this material we will guarantee that you will receive your money. Upon this agreement the Surety Company now says that it is released because, without the knowledge or consent of complainant, another agency substituted other surety in its stead. Treating the Act of 1929 as prospective, it is valid, and those who contract subsequent to its enactment would be bound by its provisions. But to give it a retrospective application certainly causes complainant to lose a large sum of money which the National Surety Company guaranteed the payment of." (R., 8-9.)

Pursuant to the majority opinion a decree was entered dismissing the action of the International Steel & Iron Company and releasing National Surety Company from all liability. (R., 9.) From this decree and from the action of the Supreme Court of Tennessee this appeal has been prayed and duly perfected. (R., 9-10.)

SPECIFICATION OF ERROR.

Chapter 80 of the 1929 Public Acts of Tennessee, as construed and applied by the Supreme Court of Tennessee in this cause, is invalid and violates Section 10, Article 1, of the Constitution of the United States in that:

(a) The rights and remedies of International Steel & Iron Company against National Surety Company as surety on the contractor's bond, and its right in and to the retained funds, became fixed at the time the contract was entered into on March 22, 1928, and was governed by the then existing statute, to-wit, Chapter 74 of the 1917 Public Acts of Tennessee, under the provisions of which the National Surety Company became obligated by its contract of suretyship to pay appellant's indebtedness in the event of default by the contractor, and further under the provisions of which funds of the contractor were required to be retained by the Highway Commissioner and paid into court for the purpose of satisfying the amount due appellant. Chapter 80 of the 1929 Public Acts, passed subsequently, as construed by the Supreme Court of Tennessee, undertook to impair, release and destroy the means provided pursuant to Chapter 74 of the Public Acts of 1917 for the enforcement of appellant's contract, and hence violated Section 10, Article 1, of the Constitution of the United States.

(b) Under the provisions of Chapter 74 of the 1917 Public Acts of Tennessee, in effect at the time the contract was entered into, National Surety Company entered into a contractual obligation, under the terms of which it guaranteed the payment of the indebtedness of International Steel & Iron Company upon default by the contractor, and Chapter 80 of the 1929 Public Acts of Tennessee impaired, released and discharged the solemn obligation of this contract without the knowledge or consent of International Steel & Iron Company, and hence is violative of Section 10, Article 1, of the Constitution of the United States. (R., 11.)

ARGUMENT.

The only applicable statute in Tennessee at the time the contract was entered into on March 22, 1928, was Chapter 74 of the 1917 Public Acts of Tennessee. Ten days prior to the making of the contract to furnish the materials the contractor made an indemnity bond with National Surety Company as contract surety thereon for a paid consideration as required by Section 6 of said Chapter 74 of the 1917 Public Acts of Tennessee. The *obligation* which the contractor and its surety were required to enter into by this statute was conditioned for the faithful performance of every part of the contract, "*especially the payment for all materials purchased, and for all labor employed in the contemplated work.*" (R., 1.) International Steel & Iron Company entered into its contract in express reliance upon the solvency and financial ability of National Surety Company to pay its indebtedness in the event of default by the contractor. National Surety Company, therefore, became bound by the obligation of its contract to pay any indebtedness that might become due to International Steel & Iron Company from the contractor if the debt was not discharged by the contractor. Although the bond was required by a statute, the obligation was that of a contract liability, voluntarily assumed.

Under the further provisions of Chapter 74 of 1917 Public Acts, the Highway Commissioner was required to retain ten per cent of the funds due the contractor, with which to satisfy just claims, and upon the institution of suit by a furnisher of materials these funds were required to be paid into court, the only condition being that such suit should be brought within a reasonable time.

It results therefore that at the time the contract was entered into, under the applicable statute the International Steel & Iron Company acquired (a), the contractual obligation of National Surety Company to pay for all materials furnished in the event of default by the contractor, and (b) a fixed right to a retainage equal to ten per cent of the amount due the contractor, to be held by the Highway Commissioner for its benefit.

Chapter 80 of the 1929 Public Acts of Tennessee was passed by the General Assembly of Tennessee on April 10, 1929, and became effective on April 11, 1929, when it was approved by the Governor. This was more than twelve months after the contractual rights and obligations of the parties had become fixed under the prior statute. This latter enactment, as construed by the Supreme Court of Tennessee in the present case, was retroactive by its terms, and had the effect of permitting the Highway Commissioner to release the retained funds previously held for appellant's benefit, and also by the same act to discharge and release the contractual obligation of National Surety Company as surety on the original contract, and all of this without the knowledge or consent of the International Steel & Iron Company.

The argument of appellant upon the unconstitutionality of Chapter 80 of the 1929 Public Acts of Tennessee, as thus construed and applied, may be summarized in the following propositions:

Summary of Argument.

1. The surety executing the contractor's bond, pursuant to the applicable statutes in existence at the time the contract was made (Chapter 74 of the 1917 Public Acts of Tennessee), became directly obligated by its contract to pay and discharge the debt due appellant upon default of the surety's principal. The obligation to enter into the bond was statutory; *the bond when entered into pursuant to the statute created a voluntary contractual obligation between the parties.*

2. The statute in effect at the time the contract was made (Chapter 74 of the 1917 Public Acts of Tennessee) further created a retained fund of ten per cent of the amount due

the contractor, to be held by the Highway Commissioner as a guaranty fund with which to pay and discharge any obligation due to the appellant as a furnisher of materials. Appellant acquired a substantive right to have such funds retained, the contract having been made in express reliance upon the statute, and the retention of such funds constituted a material part of appellant's remedy under the statute.

3. When the Supreme Court of Tennessee in the present case construed the subsequent statute (Chapter 80 of the 1929 Public Acts of Tennessee) as retroactive by its terms, and applicable to pre-existing contracts, and further construed said Act as authorizing and permitting the release and discharge of the contractual obligation of the surety on the contractor's bond, and as further permitting the diversion of the retained funds held by the Commissioner of Highways under the previous statute, and further held that such could be accomplished without the knowledge or consent of appellant, the effect of the latter statute was to both destroy and impair the obligation of the surety's contract in favor of appellant and to deprive it of a substantial remedy in and to the retained funds, amounting to both a destruction of the contract and a denial of the means of its enforcement in violation of Section 10, of Article 1, of the Constitution of the United States.

I.

The Surety Bond Was a Contractual Obligation.

There can be no question but that the execution of the surety bond by the National Surety Company on March 12, 1928, created a direct contractual obligation between it and the subsequent furnishers of material upon the public work embraced within the contract.

Chapter 74 of the 1917 Public Acts of Tennessee, and other similar statutes have been so construed by the Supreme Court of Tennessee and by this Court in numerous cases.

> *City of Bristol* v. *Bostwick,* 139 Tenn., 304.
> *Cass* v. *Smith,* 146 Tenn., 218.
> *Southern Construction Co.* v. *Halliburton, et al,* 149 Tenn., 319.
> *Standard Oil Co.* v. *Jamison Bros.,* 166 Tenn., 53.
> *Equitable Surety Co.* v. *United States,* 234 U. S., 448.

The Supreme Court of Tennessee has construed Chapter 74 of the 1917 Public Acts of Tennessee as being designed primarily for the protection of the furnishers of material on public works.

> "The laborer and materialman are objects of special protection in matters such as the one before us. Such a policy of our law is plain in the statute."
>
> *Southern Construction Co.* v. *Halliburton,* 149 Tenn., pp. 337, 338.

Construing a similar statute the court said:

> "Under Chapter 182 of the Acts of 1899, upon giving proper notice of their claims, laborers and materialmen might have themselves sued on such a bond, or the High School Board might have sued in the outset for the benefit of such laborers or materialmen."
>
> *Cass* v. *Smith,* 146 Tenn., p. 227.

The contractual obligation of such a bond was expressly recognized by the Supreme Court of Tennessee in the following language:

> "We think the bond is dual in its nature, as recognized in some of our cases (*Cass* v. *Smith,* 146 Tenn., 225, and *City of Bristol* v. *Bostwick,* 139 Tenn., 304), and the action thereon by the Oil Company may be sustained in either aspect."
>
> *Standard Oil Co.* v. *Jamison Bros.,* 166 Tenn., pp. 55, 56.

In the case of *Cass* v. *Smith,* 146 Tenn., at pages 227-228, the Supreme Court of Tennessee, construing a similar statute, quoted with approval from a decision of the Supreme Court of the United States in *Equitable Surety Co.* v. *United States,* 234 U. S., 448. In the latter case this court specifically held that a similar surety bond executed pursuant to an analogous Federal Statute created a contractual obligation in favor of the furnisher of material which could not be bartered away without the consent of the beneficiaries. We quote from the opinion of Mr. Justice Pitney as follows:

> "In *United States Fidelity & G. Co.* v. *Golden Pressed & Fire Brick Co.* (*United States Fidelity & G. Co.* v. *United States*), 191 U. S., 416, 48 L. Ed., 242, 24 Sup. Ct. Rep., 142; and *United States use of Hill* v. *American Surety Co.,* 200 U. S., 197, 203, 50 L. Ed., 437, 440, 26 Sup. Ct. Rep., 168, this court adopted a reasonably liberal construction of the Act of 1894, in view of the fact that it was evidently designed to furnish the obligation of a bond as a substitute for the security which might otherwise be obtained by attaching a lien to the property; such lien not being permissible in the case of a government work. . . .
>
> ". . . The object of the legislation was to give legal sanction to the 'additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract,' and to give to such a laborer or materialman the right to bring an action, if necessary, upon the bond, either in the name of the District of Columbia or of the United States, for his own benefit, against the contractor and sureties. The nominal obligee is, with respect to these third parties, a mere trustee, and the obligors, including the surety as well as the principal contractor, enter into the obligation in full view of this. The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanics' lien in the case of public buildings) would otherwise be subject to great losses at the hands of

> insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance that the claims will be paid."
>
> *Equitable Surety Co.* v. *United States,* 234 U. S., pp. 455, 456.

Thus a contractual obligation existed in favor of International Steel & Iron Company from the moment it entered into the contract to furnish the steel to the principal contractor. Under this contract National Surety Company obligated itself voluntarily as surety and guaranteed the payment of the indebtedness to accrue in the event of default by the principal contractor. The obligation of this contract is apparently recognized by the majority opinion of the Supreme Court of Tennessee in the present case in the following language:

> "These bonds taken by governmental agencies are dual in nature. They undertake to secure to the obligee the faithful performance of the public work and also, by statutory requirement, undertake to secure to the laborers and materialmen payment of their claims against the contractor." (R., 3-4.)

The majority opinion, however, held that the statute, in requiring the surety bond, was undertaking to afford the materialman a "remedy." The Court thereupon proceeded to deal with the surety's contractual obligation upon the theory that it being a mere "remedy" (as distinguished from a "right"), it could be altered or discharged by subsequent legislation if another substantial remedy were provided in its place. The holding of the majority of the justices was equivalent to saying that if the obligation of a contract was provided as a remedy required by statute, such contractual obligation was not within the protection of Section 10, Article 1, of the Constitution of the United States.

The fundamental error of the Court is apparent: The Legislature may provide such remedies as it deems advisable for a materialman in lieu of the ordinary lien which does not obtain upon public works. If this remedy consists of a contractual obligation voluntarily entered into by a surety, the Legislature could not thereafter impair or destroy such an obligation by a retroactive statute without violating the section of the Federal Constitution above referred to. The obligation of a contract, after it is entered into, is protected by the Constitution, irrespective of whether it was entered into *pursuant to a statute, or in the absence of a statute.* Such was the basis of the dissenting opinion of Mr. Justice McKinney. (R., 8-9.)

It being conceded by all parties that the effect of the subsequent enactment, Chapter 80 of the 1929 Public Acts of Tennessee, was to release and discharge the contractual obligation of the National Surety Company as surety without the consent of the obligee it is submitted that the subsequent enactment violates the applicable provisions of the Constitution of the United States and is, therefore, void. This being true, the Supreme Court of Tennessee should have rendered the judgment in favor of International Steel & Iron Company against National Surety Company and its surety on the appeal bond in this case, for the amount of the debt, to wit $58,593.71.

II.

Substantive Rights in Retainage.

Chapter 74 of the 1917 Public Acts of Tennessee afforded appellant a further substantive right by requiring the Highway Commissioner to retain ten per cent of the sums due the contractor as a guarantee fund for the payment of the contractor's indebtedness for material and labor. Upon the filing of proper claim by materialmen and failure of the contractor to pay, the Highway Commissioner became a mere stakeholder of this fund and was prohibited by the statute from turning it over to the contractor and was required to pay the funds into court to satisfy the materialman's claim if suit was brought within a reasonable time.

In the present case, at the conclusion of the work, the Highway Commissioner had retained more than sufficient funds to satisfy the claim of International Steel & Iron Company. The Commissioner had no interest in the funds, being merely a stakeholder, enjoined with the duty (under Chapter 74 of the 1917 Public Acts of Tennessee) of holding these funds and paying them into court for the materialman's benefit. He was not permitted under any circumstances to deliver these funds to the contractor until after the materialman had waived its right by failure to sue within a reasonable time. He could not take a refunding bond, nor could he destroy the materialman's rights to have these funds subjected to the payment of his claim.

The majority opinion of the Supreme Court of Tennessee in the instant case has held that all of these rights were changed and taken away by the subsequent enactment of Chapter 80 of the 1929 Public Acts of Tennessee. That court held that the Highway Commissioner, although a mere stakeholder, having no interest in the funds, might pay them over to the contractor upon the execution of a refunding bond, and that such refunding bond might be taken without the knowledge or consent of the furnisher of materials. This effectively destroyed and impaired a fund created for the sole benefit of the furnisher of materials, which was mandatory under the law in existence at the time International Steel & Iron Company entered into its contract in this cause.

III.

Discussion of Legal Questions.

It is elementary that the obligations of a contract are impaired by a law which releases or extinguishes such obligation.

Sturges v. *Crowninshield,* 4 Wheat., pp. 197, 198.
Ogden v. *Saunders,* 12 Wheat., 213.
Home Building & Loan Assn. v. *Blaisdell,* 290 U. S., 398.

In *Home Building & Loan Association* v. *Blaisdell,* 290 U. S., p. 398, this court said:

> "The obligation of a contract is 'the law which binds the parties to perform their agreement.' *Sturges* v. *Crowninshield,* 4 Wheat., 122, 194, 4 L. Ed., 529, 549. 549 Story. op. cit., Sec. 1378. This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which effect its validity, construction, discharge and enforcement. . . . Nothing can be more material to the obligation than the means of enforcement. . . . The ideas of validity and remedy are inseparable and both are parts of the obligation, which is guaranteed by the Constitution against invasion.' *Von Hoffman* v. *Quincy,* 4 Wall., 535, 550, 552, 18 L. Ed., 403, 408, 409. See also *Walker* v. *Whitehead,* 16 Wall., 314, 317, 21 L. Ed., 357, 358. . . .
>
> "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them. (*Sturges* v. *Crowninshield, supra* (4 Wheat., pp. 197, 198, 4 L. Ed., 549)), and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights."
>
> *Home Building & Loan Association* v. *Blaisdell,* 290 U. S., p. 398.

Any statute passed after National Surety Company had entered into its contractual obligation for the benefit of International Steel & Iron Company, which had the effect of releasing or extinguishing the right of International Steel & Iron Company to sue and enforce payment upon the contractual obligation, was an impairment of the obligation of the contract, and Chapter 80 of the 1929 Public Acts of Tennessee having been expressly given such a construction by the Supreme Court of Tennessee, it must be struck down as a violation of the constitutional rights of International Steel & Iron Company.

It is said in reply to the foregoing argument that the contractual obligation of the surety and the right in the retained funds provided pursuant to Chapter 74 of the 1917 Public Acts of Tennessee, were not, properly speaking, *rights* at all but were *remedies* afforded the materialman by the statute to enable it to enforce its rights arising under the agreement with the general contractor. (R., 4-5.) It is then argued that the legislature might properly alter this remedy without impairing a constitutional right provided it substituted another remedy which ordinarily would afford adequate protection. Upon this hypothesis the majority of the Supreme Court of Tennessee concluded that Chapter 80 of the 1929 Public Acts provided a new contractual obligation against the refunding surety to take the place of the preexisting contractual obligation against the contract surety which had been released by the statute. It is said that ordinarily one surety is as good as another, though the opinion expressly recognizes the possibility of insolvency of one or both of such sureties. (R., 8.) The effect of such an argument is to say that the legislature may destroy the obligation of a contract if it provides a substitute contractual obligation assumed by a stranger to the original contract, and that this can be accomplished against the will and without the consent of the beneficiary of the original contract. It would be the same thing to say that the legislature may release the surety on a promisory note provided it within its wisdom substituted some one else in the place of the original surety, upon the theory that a contractual surety who guarantees the payment of an obligation merely affords a "remedy," and that ordinarily one surety would be considered as financially responsible as any other surety. We submit that such an argument is unsound. If the right to sue a surety on a contractual obligation be considered a remedy, it is a remedy which cannot be impaired and which is protected by the Constitution of the United States. To release the obligation or extinguish it by a subsequent statute is a violation of constitutional rights which is not cured or prevented by the attempted substitution of another contractual obligation.

Furthermore, it must be remembered that even if Chapter 80 of the 1929 Public Acts of Tennessee be construed as effecting only a remedy, it is clear that it impaired and destroyed the right of the materialman to the retained fund held by the Highway Commissioner as a stakeholder (which in the present case exceeded the amount of the indebtedness) and impaired and destroyed its right to have these funds applied to the satisfaction of its indebtedness, and substituted in lieu thereof merely a right to sue a new surety on a refunding bond, selected without its knowledge or consent. Looking at the situation from the standpoint of a remedy only, Chapter 80 of the 1929 Public Acts destroyed a substantial remedy which was held by the International Steel & Iron Company, and substituted a chose in action of doubtful value in its place. The obligation of a contract includes its means of enforcement and the substantive rights created thereby in and to funds or property held by stakeholders to guarantee such enforcement.

State of Louisiana v. *Police, Jury, etc.,* 111 U. S., 716.
Worthen v. *Thomas,* 292 U. S., pp. 431, 432.
Worthen v. *Kavanaugh,* 295 U. S., 56.

> "Whether such repeal was effectual to deprive him of the process prayed, depended upon the question whether the judgment was founded upon a contract, the obligation of which the State is prohibited from impairing. *By the obligation of a contract is meant the means which at the time of its creation, the law affords for its enforcement.*"

State of Louisiana v. *Police Jury, etc.,* 111 U. S., 716, 28 L. E., 574.

> "To know the obligation of a contract we look to the laws in force at its making. *Sturges* v. *Crowninshield,* 4 Wheat., 122, 197, 4 L. Ed., 529, 549; *Home Bldg. & Loan Association* v. *Blaisdell,* 290 U. S., 398, 429, 78 L. Ed., 413, 423, 54 S. Ct., 231, 88 A. L. R.,

> 1481. In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. *Von Hoffman* v. *Quincy,* 4 Wall., 535, 18 L. Ed., 403; *Louisiana* v. *New Orleans,* 102 U. S., 203, 26 L. Ed., 132; *Barnitz* v. *Beverly,* 163 U. S., 118, 41 L. Ed., 93, 16 S. Ct., 1042; cf. *Home Building & Loan Association* v. *Blaisdell, supra* (290 U. S., 429, 434, 78 L. Ed., 423, 426, 54 S. Ct., 231, 88 A. L. R., 1481), where the cases are assembled. The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. *W. B. Worthen Co.* v. *Thomas,* 292 U. S., 426, 433, 78 L. Ed., 1344, 1346, 54 S. Ct., 816, 93 A. L. R., 173, distinguishing *Home Building & Loan Association* v. *Blaisdell,* 290 U. S., 398, 78 L. Ed., 413, 54 S. Ct., 231, 88 A. L. R., 1481, *supra.* We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower. The case does not call for definition more precise."
>
> *Worthen* v. *Kavanaugh,* 295 U. S., 56.

A statute which proposes to release the solemn obligation of a pre-existing contract upon the strength of which the appellant furnished its materials, and at the same time discharges and destroys appellant's rights in and to a trust fund retained by the Highway Commissioner as a mere stakeholder for the sole benefit of this furnisher of materials, and seeks to substitute in lieu thereof the obligation of a surety on a refunding bond without giving the materialman a right to pass upon the solvency of the new surety,—and in fact without its knowledge or consent—is most certainly a statute which takes away substantive rights and remedies, and is so oppressive as to violate the protective provisions contained in the Federal Constitution.

We, therefore, respectfully submit that Chapter 80 of the 1929 Public Acts of Tennessee, as construed by the majority opinion of the Supreme Court of Tennessee in the present case, must be held to be violative of Section 10, Article I, of the Constitution of the United States, and, therefore, void and of no effect, and that the decree of the Supreme Court of Tennessee should be reversed, and that judgment should be rendered in favor of appellant against National Surety Company, and likewise against its surety on the appeal bond in the state courts for the sum of $58,593.71 and that such judgment should be entered in this court in accordance with the applicable federal statute, or the cause should be remanded to the Supreme Court of Tennessee for such purpose.

Respectfully submitted,

Isidor Kahn,
Louis Leftwich,
Cecil Sims,
Counsel for Appellant.

F. M. Bass,
Of Counsel.

APPENDIX.

CHAPTER NO. 74, 1917 PUBLIC ACTS OF TENNESSEE.

Senate Bill No. 232.

(By Messrs. Matthews, Johnson, Creswell, Haston, Nichols, Jarvis.)

AN ACT to provide revenue for use in road building in this State by the State Highway Department, acting in conjunction with the Secretary of Agriculture of the United States and in conformity to an Act of the Sixty-fourth Congress approved July 11, 1916, entitled, "An Act to provide that the United States shall aid the States in the construction of rural Post Roads, and for other purposes;" to provide for the expenditure of all funds raised by the State of Tennessee to supplement said Federal appropriation and other funds raised under this Act; to confer upon the State Highway Department certain powers with respect to the distribution and expenditure of said entire fund, and to impose certain duties and place certain restrictions upon said State Highway Department with respect thereto and to provide the means and instrumentalities for laying out and carrying on the work of road building in this State, as contemplated by said Federal statute; and to penalize violations of this Act.

. . . .

. . . .

Sec. 6. *Be it further enacted,* . . . . All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work. This bond must be approved by the Department and filed with its records. The contract shall provide that the work executed thereunder shall be subject to the inspection, approval, and acceptance of the State Highway Engineer or his assistant engineer acting on oath and under bond. Not more than ninety per cent of the contract price shall be paid on any contract until it is completed and the work is accepted. Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his subcontractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days' notice in some newspaper published in the county where the work is done, if there be a newspaper published there, and if not, in a newspaper in an adjoining county, that settlement is about to be made and notify all claimants to file notice of their claim with the Secretary of the Department. The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction.

. . . .

Passed March 30, 1917.

W. R. CRABTREE,
Speaker of the Senate.

CLYDE SHROPSHIRE,
Speaker of the House of Representatives.

Approved April 3, 1917.

TOM C. RYE,
Governor.

CHAPTER NO. 80, 1929 PUBLIC ACTS OF TENNESSEE.

SENATE BILL NO. 510.

(By Messrs. Pratt, Adams and Gray.)

AN ACT to amend Chapter 74 of the Public Acts of the year 1917, passed March 30, 1917, approved April 3, 1917, the caption of which is as follows:

"An Act to provide revenue for use in road building in this State by the State Highway Department, acting in conjunction with the Secretary of Agriculture of the United States and in conformity to an Act of the sixty-fourth congress approved July 11, 1916, entitled, 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes'; to provide for the expenditure of all funds raised by the State of Tennessee to supplement said federal appropriation and other funds raised under this Act; to confer upon the State Highway Department certain powers with respect to the distribution and expenditure of said entire fund, and to impose certain duties and place certain restrictions upon said State Highway Department with respect thereto and to provide the means and instrumentalities for laying out and carrying on the work of road building in this State, as contemplated by said Federal Statute; and to penalize violations of this Act."

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That Chapter 74 of the Public Acts of 1917, be and the same is hereby amended as follows:

. . . .

(a) "The Secretary of the Department (now the Commissioner of Highways and Public Works) shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow claimants to sue and prove their claims against the contractor or his agent, in some court of competent jurisdiction. In the event suit is brought against the contractor within the said sixty days from the date of the last advertising, by any claimant, the Department or its officer shall pay the amount of said claim into court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.

(b) "On the date set for full and final settlement with the contractor, the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission, whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full.

(c) "All suits against contractors brought by any claimant shall make the Commissioner of Highways and Public Works a defendant thereto and, except where the same be for sums within the jurisdiction of a Justice of the Peace, shall be brought in the county where the main office of the Department of Highways and Public Works is situated. On any such suit being brought the sums then withheld may be paid into court, as above provided, by simple petition of the Commissioner which may be substantially as follows:

" 'Your petitioner, the Commissioner of Highways and Public Works, respectfully represents that under Chapter 74 of the Public Acts of 1917, and Acts amendatory thereof, he has retained from (here insert name of contractor) on final estimate or settlement, $......, equal in amount to the claim of (here insert name of claimant), as the same was filed and presented to the Department of Highways and Public Works, a copy or photostatic copy of which is hereto attached, and, therefore, as authorized by law to do, suit having been brought by the claimant, your petitioner pays said sum to the Clerk of the court, by voucher or warrant No.......... dated ...., payable to the order of said Clerk for $........., drawn against the funds of said Department of Highways and Public Works, accompanying this petition, and your petitioner prays that the cause be dismissed as to him, this payment being in the nature of and for the purpose of an interpleader.'

"Such petition shall be signed by the Commissioner or the attorney for the Department of Highways and Public Works for him, and upon the filing of such petition accompanied by such payment the suit shall be dismissed as to the Commissioner as a matter of right, such sum so paid into court, as to the plaintiff or claimant, standing in lieu and as a satisfaction of the contractor's bond and a fulfillment of the duties of the Department of Highways and Public Works to the claimant or plaintiff."

. . . .

Passed April 10, 1929.

S. R. BRATTON,
Speaker of the Senate.

CHAS. H. LOVE,
Speaker of the House of Representatives.

Approved April 11, 1929.

HENRY H. HORTON,
Governor.

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CLERK

In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

REPLY BRIEF ON BEHALF OF INTERNATIONAL STEEL AND IRON COMPANY, APPELLANT.

ISIDOR KAHN,
LOUIS LEFTWICH,
CECIL SIMS,
Counsel for Appellant.

F. M. BASS,
Of Counsel.

BAIRD-WARD—NASHVILLE

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INTERNATIONAL STEEL AND IRON COMPANY,
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NATIONAL SURETY COMPANY,
Appellee.

REPLY BRIEF ON BEHALF OF INTERNATIONAL STEEL AND IRON COMPANY, APPELLANT.

May It Please the Court:

Since the filing of the brief on behalf of appellant the appellee has filed a brief which raises and discusses a question not presented in appellant's brief and which could not have been presented at the time it was filed. We, therefore, deem it important to make brief reply to this new contention now advanced by appellee.

Appellee contends that the only question before the Supreme Court of Tennessee at the time it decided the present case was the proper interpretation of Chapter 80 of the 1929 Public Acts of Tennessee. It is said that the appellee's contention was that this statute should be construed to ef-

2

fect a release of appellee's bond as contract surety in the event of the execution of a refunding bond and it is pointed out that appellant disputed this interpretation and contended that the statute should not be construed so as to effect such a release of appellee's bond. Appellee says:

> "This was the issue in the Supreme Court, one solely of interpretation. The contract clause was not invoked in the assignments. There was no constitutional question."
>
> Appellee's Brief, p. 6.

Appellee further points out the fact that appellant included among the defendants the surety on the refunding bond taken by the Highway Commissioner while acting pursuant to the provisions of Chapter 80 of the 1929 Public Acts of Tennessee, and that judgment was rendered in favor of appellant against one of these sureties at the same time that judgment was rendered against appellee, and it is said that by reason of these facts appellant waived any right to subsequently insist upon the unconstitutionality of the statute *irrespective of the effect of any subsequent interpretation of the act,* and further that this Court has no jurisdiction to review the decision of the Supreme Court of Tennessee where the only question before that court was one of the proper interpretation of a state statute, and that the decision of the Supreme Court of Tennessee on the question of interpretation was final.

When properly analyzed, appellee's contentions resolve themselves into the following questions:

(1) Whether or not appellant raised the constitutional question properly and in sufficient time to give this Court jurisdiction on appeal;

(2) Whether or not the non-federal question of waiver and estoppel can be raised by appellee in this Court and whether it can be considered in this Court in the absence of an adjudication of the question in the opinion of the Supreme Court of Tennessee;

(3) In the event of consideration of the non-federal question of waiver or estoppel, whether or not there is any merit in the contention.

These questions will be presented in the order stated.

(1) *Jurisdiction.*

This case was considered by three State courts, the Chancery Court, the Court of Appeals and the Supreme Court of Tennessee. Neither the Chancery Court nor the Court of Appeals gave any interpretation to the statute which violated appellant's constitutional rights. The Chancery Court construed the statute as merely providing a cumulative or additional right, and as not releasing or abrogating the contract of the original surety (appellee). (Rec., 38.)

The Court of Appeals construed the statute as prospective only and as not retroactive and, therefore, inapplicable to the controversy. (Rec., 61.)

The Supreme Court of Tennessee, for the first time, at the end of the litigation construed the statute to be both retroactive by its terms and to effect a cancellation and release of the original contract surety's obligation and thereby supplied a new and unexpected basis for the claim of the denial of the federal right. Since the denial of the federal right arose out of the interpretation of the statute by the Supreme Court of Tennessee at the conclusion of the litigation, the first time appellant could assert its right was by appeal to this Court with appropriate assignments of error, which was done. (Rec., 11.)

Jurisdiction of this Court on appeal under these circumstances comes well within the law as laid down by this Court in *Saunders* v. *Shaw,* 244 U. S., 317, and *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S., 358, from which we quote, as follows:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does

not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautaions in advance."

Saunders v. *Shaw*, 244 U. S., at p. 320.

"We have then in the record what is in essence the stipulation of counsel followed by the acquiescence of the court. Whether this without more avoids the application of the general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing (*American Surety Co.* v. *Baldwin*, 287 U. S., 156, *ante*, 231, 53 S. Ct., 98; *Godchaux Co.* v. *Estopinal*, 251 U. S., 179, 64 L. Ed., 213, 40 S. Ct., 116), we are not required to determine, for here there is more, and that enough to bring the case within a well-recognized exception. The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (*Consolidated Turnp. Co.* v. *Norfolk & O. V. R. Co.*, 228 U. S., 326, 334, 57 L. Ed., 857, 862, 33 S. Ct., 510; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S., 23, 76 L. Ed., 146, 52 S. Ct., 48), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right. *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S., 673, 678, 74 L. Ed., 1107, 1112, 50 S. Ct., 451; *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S., 313, 320, 74

L. Ed., 870, 875, 50 S. Ct., 326; *American Surety Co.* v. *Baldwin*, 287 U. S., 156, *ante*, 231, 53 S. Ct., 98, *supra*."

Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U. S., at pp. 366-367.

As in the case last quoted from, apparently appellee concedes in the present case that the constitutionality of the statute (if interpreted adversely to appellant's contention), was briefed and argued before the Supreme Court of Tennessee. (Appellee's brief, p. 6.) At all events, it was expressly passed upon by the Supreme Court of Tennessee. Whether the case comes under the general rule or under the exception, the question was raised and passed on and is now before this Court on proper assignments of error.

(2) *This Court Will not Consider a non-Federal Question Unless it Was Expressly Adjudicated by the Supreme Court of Tennessee.*

The contention of appellee that appellant is estopped because it sought to enforce the obligations of the refunding bond jointly in the suit against appellee upon the theory that appellant thereby waived the unconstitutionality of the provisions of Chapter 80 of the 1929 Public Acts of Tennessee growing out of its final interpretation by the Supreme Court of Tennessee, is purely a *non-federal question.* This question was not raised by appellee in the State courts in any pleading or assignment of error and it was not adjudicated by the Supreme Court of Tennessee. Irrespective of the validity or invalidity of such insistence, it is clear that this Court cannot consider it in connection with the present appeal for the reason that it was not passed upon or adjudicated by the Supreme Court of Tennessee.

This precise question arose in *Murdock* v. *The Mayor and Aldermen of Memphis*, 20 Wallace, 590, and this Court held that it could not consider a non-federal question which had been ignored and not expressly adjudicated by the Supreme

Court of the State. We quote from the opinion, as follows:

> "But when we find that the State Court has decided the federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal, or on the other hand, whether there exist other matters in the record *actually decided by the State Court* which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the State Court.
>
> "But this examination into the points in the record other than the federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain *if any such have been decided,* and their sufficiency to maintain the final judgment, *as decided by the State Court.*
>
> "Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be re-affirmed, even in this court, if brought here again from the State Court after it has corrected its error in the matter of federal law."
>
> *Murdock* v. *The Mayor, etc,* 20 Wallace, at p. 635.

Thereupon this Court laid down seven general propositions of law which clearly define the circumstances under which the Court would give consideration to a non-federal question, two of which propositions are directly applicable to the present controversy and we, therefore, quote, as follows:

> "6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether

> there is any other matter or issue *adjudged by the State Court*, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.
>
> "7. But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, *or that there has been no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question*, then this court will reverse the judgment of the State Court, and will either render such judgment here as the State Court should have rendered, or remand the case to that court, as the circumstances of the case may require."
>
> *Murdock* v. *The Mayor, etc.*, 20 Wallace, at p. 636.

Illustrative of this principle is the recent decision of this Court in *Grayson* v. *Harris*, 267 U. S., 352. In that case the suit arose in the State court of Oklahoma and the case came to this Court on writs of error and *certiorari* to the Supreme Court of Oklahoma to review its final decree. In this Court the defendants in error relied upon two defenses which were stated by Mr. Justice Sutherland as follows:

> "On behalf of defendants in error, it is asserted: (1) That there was an entire absence of proof that plaintiffs in error are citizens of the Creek Nation and we are asked to review the record in that respect in order to determine whether there was any basis for the claim of Federal right; and (2) that an examination of the record will show that the plea of the Statute of Limitations was fully established, and, therefore, the decision of the State Supreme Court reasonably may be affirmed on that non-Federal ground."
>
> *Grayson* v. *Harris*, 267 U. S., at p. 358.

It will be seen that the plea of the Statute of Limitations was a non-federal defense, and it was disposed of by this Court in the following language:

> "Nor need we inquire into the defense of the Statute of Limitations. The decision now under review entirely ignores it. The rule that, when the decision of a state court may rest upon a non-Federal ground adequate to support it, this court will not take jurisdiction to determine the Federal question, has no application where, as here, the non-Federal ground might have been considered by the state court, but was not. *Rogers* v. *Hennepin County,* 240 U. S., 184, 188, 189, 60 L. Ed., 594, 597, 598, 36 Sup. Ct. Rep., 265; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S., 582, 608, 43 L. Ed., 823, 829, 19 Sup. Ct. Rep., 553."
>
> *Grayson* v. *Harris,* 267 U. S., at p. 358.

In the present case the non-federal question of waiver or estoppel was not adjudicated by the Supreme Court of Tennessee but was entirely ignored. Apparently it was not considered by the State Supreme Court, but if it was considered it is to be presumed that this non-federal question was decided against appellee. The opinion of the Supreme Court of Tennessee rests solely upon the federal question and there being no adjudication of any other non-federal questions adequate to sustain the judgment the only question before this Court is the correctness of the decision of the Supreme Court of Tennessee with respect to the federal question.

(3) *Appellee's Contention with Reference to Waiver and Estoppel is Wholly without Merit.*

Wholly aside from the foregoing propositions of law, the contention advanced by the appellee is without merit, for the following several reasons:

1. Appellant sued *both* the Contract Surety and the Refunding Surety, construing Chapter 80 of the Acts of 1929

to afford merely an additional surety without releasing the Contract Surety. A suit under an Act, not previously construed, upon a reasonable interpretation would not estop appellant from attacking the constitutionality of the Act where the opposing party, after the suit was brought, insisted upon a wholly different *construction* of the Act, which was not sustained except in the final decision of the Supreme Court of Tennessee.

2. The Appellee was in no manner prejudiced by the suit against both it and Refunding Surety. On the other hand, such a suit, particularly in the absence of previous judicial construction of the Statute, was manifestly for its benefit.

3. Appellant did not sue to obtain the benefits of a Statute. It sued to recover on a bond that was taken pursuant to the Statute. A mere narrative recital that the bond was taken pursuant to the law, which was true irrespective of the constitutionality of the law, does not bring the case within the estoppel rule.

4. Appellant was entitled to sue upon the refunding bond irrespective of the constitutionality of the Statute. If the Statute was unconstitutional the bond was valid and enforceable as a common law obligation. A suit on the refunding bond neither affirms nor disaffirms the constitutionality of the Statute.

These questions will be dealt with in the order above set out.

Both Sureties Sued, Construing Statute as Cumulative.

The question of the constitutionality of the Statute does not arise upon the theory of Appellant's suit. Appellant sued both the Contract Surety and the Refunding Surety, construing the Statute to provide an additional or cumulative right. There had been no previous judicial interpretation of the Statute to the contrary, and the construction of the appellant was *reasonable* and *tenable*.

After this suit was brought Appellee in its answer insisted upon a wholly different and contradictory construction of the Statute. As construed by Appellant (providing an additional right without releasing the original surety) the statute had no constitutional objection. The theory of estoppel is based upon a litigant assuming repugnant or contradictory positions. Appellant's position, under its construction of the Statute, is neither repugnant nor contradictory to its constitutionality. *A mistaken theory as to the law does not work an estoppel.*

Verhine v. *Ragsdale,* 96 Tenn., 532.
Murrell v. *Watson,* 2 Shannon's Cases (Tenn.), 244.
Tate v. *Tate,* 126 Tenn., 212.

"Where a plaintiff is defeated in an action based upon a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his views of the case, this will not as a rule preclude him from renewing the litigation, without any change in the facts, but basing his claim on a new and more correct theory. This rule applies. . . . Where an unsuccessful attempt to enforce a liability under a statute is followed by an action to hold the same defendant liable on the same facts as at common law or vice versa. . . ."

34 Corpus Juris, Sec. 1227.

Appellee Not Prejudiced but Received Distinct Advantage.

The elementary principle underlying estoppel is *prejudice* or *disadvantage.* Estoppels are odious, and appellant can not be foreclosed unless appellee has been misled by the bringing of the suit to its detriment.

What disadvantage accrued to appellee because appellant sought a judgment against both it and the Refunding

Surety? If appellant was allowed to recover against both then any sums collected from the Refunding Surety would be applied in reduction of the appellee's obligation. If appellee was made to pay the entire judgment, it would be subrogated to appellant's judgment against the Refunding Surety. Under no aspect of the case could the joining of a Refunding Surety as a party defendant, and the seeking of a judgment against it, have resulted to the appellee's disadvantage. The appellee has not only failed to show detriment or disadvantage, which is essential to invoke estoppel, but as will appear later it actually invoked the process of the Court to retain the advantage of a judgment against the Refunding Surety. Thus there was neither inconsistency, repugnancy, nor detriment—all *essential elements of estoppel.*

Narrative Reference to Statute Does Not Amount to Suit to Enforce Statute.

The allegation in appellant's original bill, upon which the appellee now relies as an estoppel, was a mere historical reference to the fact that the refunding bond was taken *"as provided by law."* This phrase was used in connection with the purely historical narrative in chronological order of the various steps taken prior to the institution of the suit. The phrase was wholly incidental and referred merely to the fact that the refunding bond was taken in accordance with the provisions contained in Chapter 80 of the Acts of 1929, *and so it was.* The suit was not to enforce a statutory liability, but to enforce the *contract obligation* of the refunding bond.

Appellee points out the fact that appellant asked to amend its bill so as to require the Commissioner to pay the retainage into court. (Appellee's Brief, p. 8.) This amendment was disallowed by the Chancellor upon the ground that it was inconsistent with the original bill, which sought a recovery on the refunding bond. (R., 36, 37.)

While this is relatively unimportant it is proper to clarify this situation. At the hearing appellant sought to amend its original bill so as to require the Commissioner of Highways to pay the retainage into court. (R., 36.) The theory of this amendment was to call upon the Commissioner to enforce the refunding bond, that is, to demand and recover the retainage back and then to pay it into court. The Chancellor in his written opinion at the beginning denied the amendment on the theory that it was inconsistent with the original bill. (R., 37.) However, the Chancellor in the concluding portion of the opinion in effect granted the relief suggested by the amendment and ordered the Commissioner to demand the return of the retainage, and if necessary, collect on the refunding bond, and pay the money into court to be credited on the judgment. (R., 42.) The Chancellor, in his original decree, granted no judgment against the refunding surety.

Thereupon appellee filed a petition to rehear, alleging that *it was aggrieved* by the failure of the Chancellor to render a judgment against the Refunding Surety. (R., 57.)

At the instance of the appellee the former decree was in part set aside and a judgment was rendered against the Refunding Surety, (R., 43, 44.)

It thus appears from the record that while the appellant in reciting the history of the transactions referred to the refunding bond as having been taken under the Statute, and sought a judgment against both the Contract Surety and the Refunding Surety, no objection was raised by the appellant when the Chancellor granted a judgment against the contractor and the appellee, and instructed the Commissioner to enforce the refunding bond and pay the money into court, and thereupon appellee took the position that it was aggrieved because the Chancellor had not granted a judgment on the refunding bond, and *insisted* and *demanded* and *procured* a judgment in the cause against the Refunding Surety. It is difficult to see how appellee can urge the fact of this judgment as an estoppel against the appellant, and we submit the contention is without merit.

Refunding Bond Enforceable Irrespective of Constitutionality of Statute.

It is submitted that the mere Act of bringing suit on the refunding bond under the facts of this case has no bearing upon the constitutionality or the unconstitutionality of the Statute under which it was taken. Appellant was entitled to sue on the undertaking irrespective of the constitutionality of the Statute. The refunding bond was based upon a valuable consideration, was voluntary in character and was a binding obligation for the benefit of the appellant, even if Chapter 80 of the Acts of 1929 was inapplicable or unconstitutional. This exact question arose and was decided in *Lake Charles Planing Mill Company* v. *Grand Lodge* (La.), 53 Southern, 550, from which opinion we quote as follows:

> "The exception of no cause of action was properly overruled, as it was expressly stipulated that all furnishers of material should have an individual right of action on the bond to insure the collection of their claims. *The recital in the bond that the same was given in accordance with Act No. 180 of 1894 does not prevent the instrument from being valid against the surety as a conventional bond to secure workmen and furnishers of supplies.*"

Further illustrative of this principle of law is the case of *Love* v. *McCoy* (W. Va.), 94 S. E., 954, from which we quote as follows:

> "The controversy requires the determination of a single inquiry, namely, whether a bond voluntarily executed, in conformity with the requirement of a statute subsequently adjudged to be invalid as in contravention of the fundamental or organic law, can serve as the basis of an action to recover damages for the breach of the obligation. As a further limitation

> upon the scope and extent of the inquiry, it may be said that its solution depends not wholly upon the constitutional incompetency of the act, for, though it thereafter be declared void, the discharge of the obligors from liability does not necessarily follow as a matter of course. While the failure of an act to stand the test of constitutionality does frequently render invalid a bond given pursuant to its requirements, and relieve the obligors from the liability it would impose if the statute were not void, yet if there be some consideration underlying it independent of the statute, or there accrues to them some benefit, advantage, or profit by its execution, they will be required to respond to the undertaking expressed in the instrument. It is not the policy of the law to permit escape from the legal consequences of the execution of such an instrument, if some one or more of the persons who bind themselves to perform its conditions receive and enjoy its fruits or the protection it affords, or derive some material or financial benefit from it. They will not, in either such event, when summoned to account for a breach of the conditions, be permitted to plead the voidness of the statute necessitating the execution of the undertaking."

The principle underlying the above decisions was adopted and approved by the Supreme Court of Tennessee in *Fidelity & Guaranty Company* v. *Rainey,* 120 Tenn., 357, in which case the bond, while purporting to be executed pursuant to the Statute, contained obligations not required by the Statute. After approving the principle above stated, and disapproving certain cases to the contrary, the Court concluded as follows:

> "The bond executed by Rainey was voluntarily executed, upon sufficient consideration, and is clearly enforceable as a common law bond to the full amount of the penalty described."
>
> *Fidelity & Guaranty Co.* v. *Rainey,* 120 Tenn., at p. 399.

If appellant was entitled to sue on the bond irrespective of the constitutionality of the Statute under which it was given, then a suit on the bond stating that it was given under the Statute could not be construed as either an affirmance or disaffirmance of the constitutionality of the Statute, and hence could not be the basis of an estoppel to subsequently question the constitutionality of the Statute under the facts of this case.

CONCLUSION.

It will be seen from the record that appellee's principal is indebted to appellant in a very large sum of money ($58,593.71), which represents materials and labor furnished in the construction of a bridge in express reliance on the contractual obligation of appellee. In appellee's brief a statement is inadvertently made in several places that the refunding surety has paid $40,000.00 into court, which has been received by appellant. (Appellee's brief, pp. 1, 2, 5.) It is true that a judgment was rendered against the refunding surety in the sum of $40,000.00 and this amount was ordered paid into court to be applied as a credit on the judgment rendered against appellee and its principal. There is no basis, however, for the statement that it has ever been paid into court and we feel sure that such insistence will not be made by appellee's counsel, as this statement is an inadvertence. This statement is made simply for the purpose of correcting a manifest inadvertence and without any reflection upon counsel for appellee. Even if the $40,000.00 had been paid into court, appellee's obligation would remain unsatisfied to the extent of $18,593.71 and the legal question presented would be the same.

On pages 10-11 of appellee's brief, counsel has manifestly misconstrued a statement contained in appellant's original brief. Appellee leaves the impression that an argumentative statement assuming a certain interpretation of Chapter 80 of the 1929 Public Acts of Tennessee for the purpose of demonstrating the violation of appellant's constitutional rights was in effect a concession of such an interpretation throughout the entire litigation. The final interpretation as announced by the Supreme Court of Tennessee is binding and controlling on this appeal and appellant and appellee must now necessarily concede the binding effect of such an interpretation. Conceding this to be true, (i. e. upon such an assumption) appellant contends the act is violative of its constitutional rights.

Respectfully submitted,

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NOTE: All italics in quotations are by counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,
vs.
NATIONAL SURETY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT OPPOSING JURISDICTION.

✓Charles C. Trabue,
William Hume,
George H. Armistead,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,
vs.
NATIONAL SURETY COMPANY,
Appellee.

REPLY TO APPELLANT'S STATEMENT AS TO JURISDICTION.

May It Please the Court:

This suit is by a sub-contractor under a highway contract. The contract was made on March 12, 1928, and at the same time a contract bond was executed in conformity with law, with the National Surety Company as surety.

The contract was completed on July 2, 1930, and the statutory advertisement for claims was made by the Commissioner of Highways for thirty days. The "date for final settlement" was September 3, 1930, and on that date or immediately thereafter, the Commissioner paid over the retainage to the contractor, taking from it a refunding bond, with a different surety company.

The suit was against the contractor, the Commissioner, the contract surety and the refunding surety. The Chancellor held that the Commissioner was discharged by payment of the retainage to the contractor, and taking from him the refunding bonds, but he rendered judgment against the contractor and against both of the sureties.

The National Surety Company, which was the contract surety and on whose behalf this brief is filed, appealed and assigned as error in the Tennessee Court of Appeals the failure of the Chancellor to hold that—

> "The release of the retainage and the delivery of the bond in place of the retainage (that is, the refunding bond) and the delivery of the bond in court in response to the suit thereon, was a fulfillment of the duties of the Commissioner and a satisfaction and discharge of the contractor's first bond on which the National Surety Company was surety."

The Acts of 1917 and 1929.

The above acts are the ones that govern the matter. The Act of 1917 (Chapter 74) provides as follows:

> "All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in the amount fixed by the Department. * * * Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his sub-contractors, or his agents, has been fully paid for and all laborers and other employees working for him, his sub-contractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days' notice in some newspaper, * * * that settlement is about to be made and notify all claimants to file notice of their claim with the Secretary of the Department.
>
> "The Secretary of the Department shall withhold

> a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction."

The amendatory Act of 1929 substituted for "a reasonable time" the definite period of "sixty days" in which claimants might institute suit. If suit was brought, the Commissioner was to file a petition in the case and pay the retainage into court.

Upon this being done both the Commissioner and the contract surety were to stand discharged. The language was as follows (Tennessee Code, Sec. 3222d):

> "Such petition shall be signed by the Commissioner or the attorney for the Department of Highways and Public Works for him, and upon the filing of such petition accompanied by such payment the suit shall be dismissed as to the Commissioner as a matter of right, such sums so paid into court, as to the plaintiff or claimant, standing in lieu and as a satisfaction of the contractor's bond and a fulfillment of the duties of the Department of Highways and Public Works to the claimant or plaintiff."

But the legislature felt that the delay of sixty days, and, if suit was brought, the indefinitely longer delay, might be unfair and embarrassing to the contractor. It was accordingly provided in the Act of 1929 that the contractor could take over the retainage at once upon executing a refunding bond, viz. (Code, Sec. 3222b):

> "On the date set for full and final settlement with the contractor the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums (to be) held for the said period of sixty days, such bond to be approved by the Commissioner, whereupon the Commissioner of the Depart-

ment of Highways and Public Works shall pay such contractor in full."

The payment by the Commissioner to the contractor in the instant case was made at the time and in exact conformity with the above provision. The refunding bond taken by the Commissioner recited:

> "This obligation is executed under the provisions of Chapter 80, Acts of 1929, and upon full understanding by all parties that it stands in place and in lieu of said $77,099.32, the retainage this day paid the contractor; that it is executed to protect said Department and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the contractor on said project, as fully as if the retainage had not been paid to the contractor but had been withheld by the Department."

Appellant brought suit on the refunding bond executed under authority of the Act of 1929, affirmed the validity of said Act, and the Chancellor rendered a judgment in favor of appellant on said bond. The appellant endeavored to take benefits under said Act in the lower court and in the Court of Appeals, and later, in the Supreme Court, sought to reverse its position and attack its validity.

The Tennessee Court of Appeals ruled—contrary to the theory and contention of both parties—that the Act of 1929 was not applicable and that the payment of the retainage by the Commissioner was therefore wrongful, and that this wrongful act of his released the contract surety.

While the effect was to discharge the contract surety, this ruling contradicted its contention, which was that the Act of 1929 was applicable and that the payment of this retainage on a refunding bond was specifically authorized by the Act and was rightful; and on that account the contract surety filed its petition for certiorari.

Appellant also filed its petition for certiorari and argued the "dual bond" cases. This was the first time they were brought into the suit. The argument was that while the payment over of the retainage might discharge the contract surety's liability to the State (one obligee), it was a legal wrong to the materialmen (the other obligee), and accordingly that the surety remained bound to them.

Appellant had sued and recovered on the refunding bond given under the Act of 1929, and it could not very well get away from that Act, and in its petition (pp. 22, 23), it argued that the payment was wrongful whether the Act of 1929 was applicable or not.

This argument was contradictory on its face, for if the Act of 1929 was applicable at all it was completely applicable. The payment of the retainage on a refunding bond in such case was rightful and not wrongful and was equally binding on all parties concerned.

But how could it be said that the payment of the retainage and the taking of a refunding bond was "unauthorized" if the Act of 1929, which specifically authorized this to be done, was applicable?

And so finally appellant in its last pleading—its answer to our petition for certiorari in the Tennessee Supreme Court—was forced to take the position that the Act of 1929 could not lawfully be applicable to this controversy.

But this last position of appellant is, as we have explained, untenable. There is, we think, no constitutional reason why the Act of 1929 should not apply. And, aside from that, appellant comes with this too late, for it has sued and recovered below on the refunding bond taken under the Act of 1929 upon the very ground and averment that it was taken "as provided by law."

The Appellant is Estopped Now to Question the Validity of Chapter 80 of the 1929 Public Acts of Tennessee.

This suit was predicated on the Act of 1929. The bill averred as follows:

> "Complainant alleges that on the day set for final settlement the said Department of Highways & Public Works had retained from the funds due the said principal contractor the sum of Seventy-seven Thousand Sixty-nine Dollars and Eighty-two cents ($77,069.82), and on September 3, 1930, the defendant National Construction Company executed to the Department of Highways & Public Works of the State of Tennessee a refunding bond, as provided by law, with the defendant, Equitable Casualty & Surety Company, as surety thereon, in the penal sum of the amount of said retainage hereinabove mentioned, whereupon the said Department of Highways and Public Works paid over said retained funds to the principal contractor and now holds said refunding bond for the benefit of claimants who had filed their claims with said Department of Highways and Public Works."

In the course of the trial below complainant asked to amend its bill so as to pray that the Commissioner of Highways be required to pay the retainage into court. But the court specifically denied the application on the ground that complainant had sued on the refunding bond and had averred that it had been taken pursuant to law. In denying this application the court said (decree of October 25, 1932):

> "The complainant in its original bill alleged in substance that the refunding bond for the retainage was executed 'as provided by law' and the Department of Highways and Public Works held it for the benefit of claimants who had filed their claims with the Department of Highways and Public Works, and prayed for a decree against the principal and the surety on the

> refunding bond for the amount claimed to be due the complainant. The proposed amendment calls for the payment of the retainage into court by the Commissioner of Highways and Public Works * * *.
>
> "Where it is alleged that the bond was taken as provided by law and the complainant has brought action thereon against the principal and surety, it cannot, after the case has gone to trial, change its position by asserting as set forth in the proposed amendment that it is the duty of the Commissioner of Highways and Public Works to pay the retainage into court. The amendment is inconsistent and repugnant to the original bill and the application to amend the original bill as proposed, is denied."

There was no exception taken to this ruling and no effort made to review it in the appellate courts.

Appellant's contention throughout was that the payment of the money and taking of the refunding bond were authorized—in other words, that the Act of 1929 applied. But the insistence in this proposed amendment was that notwithstanding the valid paying over of the money on a refunding bond, the Commissioner continued to be responsible and could be required to pay the money into court.

Appellant asked for and obtained judgment below on the refunding bond, on the ground that it was taken "as provided by law"—that is, by authority of the Act of 1929.

Accordingly, as the Chancellor ruled, appellant cannot be heard now to say that the Act of 1929 did not apply. The principle is well settled that—

> "An individual has no right to complain that a statute is unconstitutional after he has endeavored to take benefits under it to the injury of others."

The above language from Black on Constitutional Law was quoted with approval in *Collier* v. *Montgomery County*, 103 Tenn. 714, and in *Saylor* v. *Trotter*, 148 Tenn. 370.

So in *Roberts* v. *Roane County,* 160 Tenn. 124, the court approved the following language from Cooley on Constitutional Limitations:

> "There are cases when a law in its application to particular facts must be sustained, because the party who makes objection has by prior acts precluded himself from being heard against it; and when a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive protection and to consent to such action as would be invalid if taken against his will."

12 C. J., 769:

> "Thus a person who has participated in proceedings under a statute, or who has acted under a statute in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality."

And so 6 R. C. L., Constitutional Law, p. 95:

> "The rule is now generally recognized that one who invokes the provisions of a law may be denied the right to question its constitutionality. * * * A party may waive his right to question the constitutionality of a statute by proceeding under it. * * * The constitutionality of a statute cannot be raised for the first time in an appellate court."

Appellant averred the applicability of the Act of 1929 by bringing suit on the refunding bond as a bond executed "pursuant to law" and obtaining judgment on that bond, and it will not be permitted at this late day and for the first time to change the whole complexion of its suit by denying the applicability of that Act.

> "A person may, by his acts or omission to act, waive a right which he might otherwise have under the Con-

stitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action is not a Federal one."

Eustis v. *Bolles,* 150 U. S. 361.
Rutland R. Co. v. *Central Vermont R. Co.,* 159 U. S. 630.

Chapter 80 of the 1929 Public Acts of Tennessee Merely Alters the Remedy—It Does Not Impair a Contract Right.

The provision of the Act of 1929 complained of is that which allows the payment by the Commissioner to the contractor of the retainage upon taking a refunding bond.

But the whole procedure was statutory. The bond was not a matter of private contract between the materialmen and the surety. They had no right to select the surety but only the right to have a "proper bond," and one "proper bond" is in the law the same as another.

In *Campbell* v. *Cresap,* 166 Tenn. 75, the court said:

> "Ordinarily a refunding bond executed by a surety qualified to do business in Tennessee affords abundant protection to unpaid claimants for labor and materials furnished. Corporate sureties are subjected to rigid requirements as a condition of permission to transact business in this State. It is quite exceptional for one of such institutions to turn out insolvent."

There was, therefore, nothing in this provision for substituting a refunding bond that would impair the obligation of the existing contract.

An Act that subjected to garnishment the wages and salaries of public employees was held not unconstitutional as impairing the obligation of a contract, in *Cavender* v. *Hewitt,* 145 Tenn. 479. The court quoted the following with approval:

> "There can in the nature of things be no vested right in an existing law which precludes its change or repeal. In no case is there implied promise on the part of the State to protect its citizens against incidental injury occasioned by changes in the law. * * * It is entirely competent for a legislature to alter, enlarge, modify, or confer a remedy for existing legal rights."

The 1929 Act improved the situation of the claimant. Under the 1917 Act the Commissioner, after what he conconsidered "a reasonable time," could pay the money to the contractor and discharge both himself and the surety.

These conditions were insecure and precarious for a claimant. The 1929 Act was to improve these conditions. Under the later Act the claimant was assured that during sixty days the money could not be paid out by the Commissioner except either (a) into court or (b) to the contractor on taking a refunding bond.

The Supreme Court of Tennessee in its opinion in the present case, among other things, said:

> "The Act of 1929 declared that its provisions should 'take effect from and after its passage.' That is, the procedure outlined should be thereafter followed. The Act dealt with procedure to be followed upon the completion of all highway contracts, irrespective of the date of any contract. Nothing to the contrary can be gathered from any portion of the amendatory statute.
>
> "Chapter 80 of the Acts of 1929 thus interpreted is retrospective only in the sense that it may be said to have altered the remedies previously existing for enforcing rights arising under earlier contracts. On its face the statute is retrospective to that extent.
>
> "It is the general rule that, where a statute deals with procedure only, it applies *prima facie* to rights of action that have accrued and indeed to pending actions. Lewis' Sutherland Statutory Construction, Second Edition, Vol. 2, p. 1226, 25 R. C. L. 791, 59 C. J. 1173.

"The constitutional rights of one whose existing remedy is thus taken away are not infringed if the procedural statute provides him a new and effective remedy instead. This is true even though the new remedy is not so convenient.

"The Supreme Court of the United States has announced the same rule. *Tennessee* v. *Sneed,* 96 U. S. 69; *Fourth National Bank* v. *Francklyn,* 120 U. S. 764.

"By the Act of 1917 complainant Steel Company was given recourse on the retainage and on the contract bond to secure its rights arising under its engagement with the general contractor. For these remedies the Act of 1929 substituted recourse on an indemnity or refunding bond.

"It seems to us the substitute remedy was adequate and effectual, as well as conventional. We suppose that statutes exist everywhere to permit the release of property taken under the levy of an execution or attachment upon the execution of a good bond by the property owners. We have not heard the validity of such statutes questioned. We see no impropriety therefore in a statute permitting the general contractor to secure the release of his retainage upon the execution of a good bond.

"Likewise the substitution of the refunding or indemnity bond for the contract bond seems unobjectionable. In either case, the bond would have to be approved by the Highway Commissioner. The protection offered by one bond would ordinarily be as good as the protection offered by the other. As a rule, bonds from surety companies are taken.

"Owing to the economic stress of recent years, the surety company executing the contract bond and the surety company executing the refunding bond both became involved in financial difficulties. For that reason the complainant Steel Company is here seeking to hold both surety companies.

"In our opinion, for the reasons heretofore stated, the surety on the contract bond has been discharged from liability and the decree of the Court of Appeals is accordingly affirmed.''

A State legislature may alter the remedy to enforce a contract without impairing its obligation, provided an effectual remedy is left for its enforcement.

Tennessee v. *Sneed,* 96 U. S. 69.
Fourth National Bank v. *Francklyn,* 120 U. S. 764.

Respectfully submitted,

William Hume,
Counsel for Appellee,

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In The

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, APPELLEE.

CHARLES C. TRABUE,
Counsel for Appellee.

WILLIAM HUME,
GEO. H. ARMISTEAD, JR.,
Of Counsel.

BAIRD-WARD—NASHVILLE

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In The

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, APPELLEE.

May it Please the Court:

Appellant, the complainant below, comes to this Court to complain of the application to this case of chapter 80 of the Tennessee Public Acts of 1929, on the ground that it impairs contract rights of complainant.

The answer to this is, as we shall undertake to show, that complainant itself applied the 1929 Act to this case, that it sued on a statutory bond given pursuant to that Act and recovered on the bond and received and appropriated the proceeds, to-wit, $40,000; and that therefore the applicability of the 1929 Act to this case was not and could not be a determinative question.

Also we shall undertake to show that the Act of 1929 was and is applicable to the case in any event.

I.

Complainant cannot be heard to complain of the Act because it sued and recovered on it in this case.

No question is made of the *right and power* of the legislature to enact the law. The sole complaint is that it cannot be applied to *this* case because it would impair complainant's contract rights.

But complainant (the appellant here) itself applied the Act to this case. *It sued and recovered on the Act.* Thus in its brief in this court (p. 4) it is stated that complainant sued on a refunding bond given "pursuant to a *subsequent* statute known as chapter 80 of the Acts of 1929," and that "judgment was entered against this latter refunding bond for the amount of its bond." And then in its petition for appeal (R., 10) complainant says that the question it seeks to make in this court is as to "the constitutional validity of . . . chapter 80 of the 1929 Public Acts of Tennessee"—*the same Act upon which it had sued and recovered.* These facts are not only conspicuous in the record but are *found and recited in the opinion of the Supreme Court,* which states that complainant had filed its claim with the Highway Commissioner "according to subsection (e) of section 1, chapter 80, of the Acts of 1929," and that complainant had sued on the bond given pursuant to that Act, and that *it had recovered on that bond and received from it $40,000.00.* (R., 1-3.)

And while the Tennessee Supreme Court does not comment on the legal effect of complainant's suing and recovering on the Act complained of, that effect necessarily follows from the facts. Indisputably, as we will show, the question in the case from the beginning was not whether the Act of 1929 was applicable—for that Act was invoked and brought into the case by complainant—but was as to the interpretation of the Act.

This court has often said that for the purpose of ascertaining whether there was a proper federal question in a case coming up from a state court it would determine for itself whether non-federal grounds of the decision below were substantial. *Ward* v. *Love County*, 253 U. S., 17, 22, 64 L. Ed., 751, 758; *Schuylkill Trust Co.* v. *Pennsylvania*, Adv. Opin. Vol. 80, L. Ed., No. 1, p. 115.

And for the same reason it is submitted that a litigant who on his own showing has sued on a statute and received its benefits will not be heard in this court to complain that the statute impairs his contract rights.

The facts briefly are these: On March 12, 1928, the Commissioner of Highways of Tennessee entered into a contract with the National Construction Company to build a certain bridge across the Tennessee River. The law then governing the matter was chapter 74 of the Acts of 1917. Pursuant to that Act the National Construction Company gave to the Commissioner a bond to guarantee the performance of the contract and payment for work and labor. Appellee (National Surety Company) became the surety on that bond, which, because it was given for the performance of the contract, we call the contract bond.

Also the Act of 1917 required the Commissioner to hold back for certain purposes part of the contract price accruing under highway contracts, called retainage.

After this particular contract was made and the contract bond executed there was enacted chapter 80 of the Acts of 1929, which among other things authorized the Commissioner at the completion of the contract to turn over the retainage to the contractor on his executing a proper refunding bond. This was done in the instant case, so that *there was both a contract bond* (on which appellee was surety) *and a refunding bond* with another surety. The substantial terms of the two Acts are set out in the Appendix to complainant's brief in this court.

Complainant was a subcontractor and had a claim, and it brought this suit against the contractor and *on both bonds.* (R., 13.)

As to the refunding bond the bill averred (R., 16):

> "Complainant alleges that on the day set for final settlement the said Department of Highways & Public Works had retained from the funds due the said principal contractor the sum of Seventy-seven Thousand Sixty-nine Dollars and Eight-two cents ($77, 069.82), and on September 3, 1930, the defendant National Construction Company executed to the Department of Highways & Public Works of the State of Tennessee *a Refunding Bond, as provided by law,* with the defendant Equitable Casualty & Surety Company, as surety thereon, in the penal sum of the amount of said retainage hereinabove mentioned, whereupon the said Department of Highways and Public Works paid over said retained funds to the principal contractor and *now holds said Refunding Bond for the benefit of claimants* who had filed their claims with said Department of Highways & Public Works."

The "Refunding Bond as provided by law" on which complainant was thus suing was the refunding bond provided for *by chapter 80 of the Acts of 1929, the Act that complainant is here complaining of.* This refunding bond recited (R., 20): "This obligation is executed under the provisions of chapter 80, Acts of 1929 . . ."

Accordingly complainant in the Chancery Court invoked the Act of 1929 specifically and sued on the bond given pursuant to it as a bond "provided by law."

The answer to the bill of the contract surety (this appellee) stated (R., 32):

> "It is insisted that the release of said retainage and *the acceptance of said refunding bond necessarily released and relieved this defendant* of any liability to

> the Department of Highways and Public Works. . . . It is further insisted that the release of said retainage and the acceptance of said refunding bond necessarily released and relieved this defendant of any and all liability to each and every claimant included in said refunding bond, one of which was the complainant herein."

So that the question, as stated, was one of *interpretation* and not of constitutional law—of the interpretation of an act that complainant had sued upon.

The refunding bond was sufficient to cover all claims but the refunding surety became insolvent while the case was in the Chancery Court and another refunding surety was substituted in the amount of $40,000. Complainant asked for judgment on the original refunding bond and then on the substitute refunding bond, and *it was given judgment and the $40,000 was paid into court and was applied on complainant's claim.* (R., 16, 40.)

This left an unpaid balance. The contract surety (this appellee) had insisted in its answer quoted above that the paying over of the retainage and taking of a refunding bond pursuant to the Act of 1929 had the effect of discharging the contract bond. The question was not whether the Act of 1929 was applicable—its applicability was a substantive basis of complainant's suit—but was solely with respect to the meaning of the Act.

The Chancellor *construed* the Act as intending that the claimant could look to *both bonds,* and he therefore rendered judgment against the contract surety for the claim less the amount paid by the refunding surety.

The contract surety (this appellee) then appealed from the Chancery Court to the Tennessee Court of Appeals. That court reversed the decision on the ground that the payment over of the retainage under the Act of 1929 *so impaired the rights of the contract surety* as to effect its discharge. (R., 67.) That was when and where the contract clause of the constitution *first came into the case. No one had invoked that clause. And it was applied not in complainant's favor but in the contract surety's favor.*

Both complainant and the contract surety then filed petitions for *certiorari* in the Tennessee Supreme Court. The contract surety in its assignments of error *insisted on its contention made in the Chancery Court,* namely, that the intention of the 1929 Act was that on payment of the retainage and taking a refunding bond the contract bond should stand discharged. (R., 68.) *The complainant disputed this contention.* Its sole assignment of error was (R., 69):

> "The Court of Appeals erred in holding that the action of the Commissioner of Highways and Public Works in payment over to the National Construction Company the retained funds aggregating $77,069.82 on September 3, 1930, and taking a refunding bond *released and discharged* the National Surety Company as a general surety on said contractor's bond for all liability thereunder to furnishers of material and labor used in the building of said bridge, and in reversing the judgment of the Chancellor and dismissing the suit as to the defendant National Surety Company."

This was the issue in the Supreme Court, one solely of interpretation. The contract clause was not invoked in the assignments. There was no constitutional question.

It does not appear from the record here how the constitutional question came into the case on complainant's behalf. Plainly it was not from the pleadings or assignments of error. It may be presumed, therefore, that it arose in the briefs or argument in the Supreme Court. The Chancellor had interpreted the Act as intending that both bonds should be liable. The Supreme Court reached a different conclusion. That court settled in this case and lawfully settled the *interpretation* that the payment over of the retainage and the taking of a refunding bond pursuant to the Act of 1929 discharges the contract bond. (R., 4.)

No one disputes that interpretation or disputes the fact that it was a determination solely within the right of the Supreme Court of Tennessee and did not involve any federal question.

After interpreting the Act the Supreme Court went on to express the opinion that the Act related to the remedy; and that is the basis and the only basis for claiming a federal question.

That was not a determinative question and could not be made so. Complainant had not assailed the Act but had invoked it. *It could not recover on the Act and at the same time attack it.* And the record affirmatively shows that the only issue made in the pleadings and assignments of error was with respect to the interpretation of the Act.

It might be immaterial whether complainant, suing on the refunding bond taken under the 1929 Act, alleged that it was a lawful bond or an unlawful one. As a matter of fact, as heretofore pointed out, complainant sued on it as a bond properly and lawfully taken—"as provided by law." (R., 16.)

It is an elementary principle that one who claims the benefit of a statute cannot at the same time assail it. 6 R. C. L., p. 95; 12 C. J., 769; *Collier* v. *Montgomery County,* 103 Tenn., 714.

So in *Roberts* v. *Roane County,* 160 Tenn., 124, the Court approved the following language from Cooley Const. Lim.:

> "There are cases when a law in its application to particular facts must be sustained, because the party who makes objection *has by prior acts precluded himself from being heard against it;* and when a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for

> him to waive protection and to consent to such action as would be invalid if taken against his will."

This principle was very sharply called to complainant's attention in the Chancery Court.

Under the Act of 1917 the Commissioner of Highways was to retain a certain part of the contract price until all claims were paid. The 1929 Act authorized the surrender of this retainage to the contractor on his giving a refunding bond. At the final hearing complainant asked to amend its bill so as to require the Commissioner of Highways to pay this money into court, and the Chancellor refused this application, stating in his decree (R., pp. 36-7):

> "The complainant in its original bill alleged in substance that the Refunding Bond for the retainage *was executed 'as provided by law'* and the Department of Highways and Public Works held it for the benefit of claimants who had filed their claims with the Department of Highways and Public Works, and *prayed for a decree against the principal and the surety on the Refunding Bond* for the amount claimed to be due the complainant. The proposed amendment calls for the payment of the retainage into court by the Commissioner of Highways and Public Works. The complainant having sued on the bond and thereby treated it as a valid obligation, subjecting the principal and surety thereon to the demands of complainant in a direct suit on the bond, cannot by an amendment allege that it is the duty of the defendant, R. H. Baker, Commissioner of Highways and Public Works, to pay the retainage into court for which the bond was executed.
>
> "Where it is alleged that the bond was taken as provided by law and the complainant has brought action thereon against the principal and surety, it cannot, after the case has gone to trial, change its position by asserting as set forth in the proposed amendment that it is the duty of the Commissioner of Highways and

> Public Works to pay the retainage into court. *The amendment is inconsistent and repugnant to the original bill* and the application to amend the original bill as proposed, is denied." (Italics Ours.)

The Supreme Court stated definitely its conclusion that the taking down of the retainage would release the contract surety, viz:

> "It must have been contemplated that the release of the retainage by the Highway Commissioner either under (a) or under (b) [referring to the provisions of the Act]—the retainage being adequate to cover litigated claims—would discharge the surety on the contract bond from liability to laborers and materialmen; otherwise the validity of (a) and (b) could scarcely be sustained," etc. (R., 4.)

It may, perhaps, be urged that complainant accepted and adopted the Act of 1929 in so far as it authorized substituting a refunding bond for the retainage (that was specifically called to complainant's attention in the ruling by the Chancellor set out above), but that complainant cannot be held to have accepted the Act of 1929 in so far as it had the effect of releasing the contract surety. If such a distinction could be made, complainant would still be in the position of having assented to the release of the retainage, and, if it would be no further bound by the Act of 1929, its consent to the release of the retainage disentitled it to hold the contract surety. That is the plain purport of the language of the Tennessee Supreme Court quoted above.

However, the position is not tenable that complainant might be bound by the Act in part and not in whole. *When complainant invoked the Act it was in the same situation as a claimant whose rights arose after the Act.* Such claimant would not know in advance what the court's interpretation of the two acts would be but he would nevertheless be bound by that interpretation. Complainant might have had the right to make the question of impairment *if* *the 1929 Act was being imposed on it against its will.* But when it invoked the Act and sued on the bond issued pursuant to it, and when the contract surety in its answer took the position that this would effect its discharge, and when complainant elected nevertheless to proceed against the refunding bond, it must be held to have accepted the Act of 1929 with all of its attributes and results.

Judge McKinney in his dissenting opinion (R., 8) agrees that the Act of 1929 is valid, but holds that it cannot apply to this particular contract because this contract and the contract bond were entered into before the passage of the Act. *But if the Act does not apply it does not belong in this case at all. And yet it is in this case and was brought into the case by complainant.* It has been given the effect in this case of substituting for the retainage the refunding bond, and complainant *has assented to this effect* by abandoning the retainage and suing and recovering on the refunding bond.

And if procedure under the Act of 1929 be given *the further effect* by the Supreme Court of discharging the contract bond, that is a mere matter of the interpretation of an act which complainant has adopted and availed itself of. And where complainant has thus committed itself to an act and received the benefits of it, it cannot complain thereafter when it discovers that the act also imposes some disadvantages.

In the opposing brief it is said (p. 17):

> "*It being conceded by all parties* that the effect of the subsequent enactment, chapter 80 of the 1929 Public Acts of Tennessee, was to release and discharge the contractual obligation of the National Surety Company as surety without the consent of the obligee, it is submitted that the subsequent enactment violates the applicable provisions of the Constitution of the United States and is, therefore, void."

And yet with that knowledge or presumed knowledge ("conceded," as counsel say) complainant, far from repudiating the applicability of the 1929 Act, sued on it and recovered—at the same time being warned by the answer of the contract surety and by the Chancellor that the 1929 Act would deprive complainant of rights under the 1917 Act.

And also in the opposing brief it is said (pp. 17-18):

> "He [the Highway Commissioner] could not take a refunding bond nor could he destroy the materialman's rights to have these funds [the retainage] subjected to the payment of his claim."

But complainant sued and recovered *on the very refunding bond that it undertakes to say in this court the Highway Commissioner "could not take."* It was a bond given under the 1929 Act that complainant here seeks to repudiate. And complainant sued on it as a bond given "as provided by law."

It is respectfully submitted that an examination of the opinion in the light of the record will conclusively show that the determinative question was as to the interpretation of the 1929 Act, and that complainant, having invoked that Act and sought and obtained a recovery under that Act, cannot be heard to say that it impaired his rights.

II.

The 1929 Act was in any Event Applicable to this Case.

The Chief Justice of the Tennessee Supreme Court granted the appeal to this court. But that court was of opinion that no federal constitutional question was involved. The opinion, which was written by the Chief Justice, states that (R., 5):

> ". . . our construction of chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty,"

The bond given under the 1917 Act was a statutory bond. It was made to the State as obligee, and while it was also available to materialmen, their rights depended entirely on the statute.

The court said that it had previously held in *Southern Construction Co.* v. *Halliburton,* 149 Tenn., 319, 332—

> "That the statutes requiring contractors on public works to execute bonds for the protection of laborers and materialmen had the same general purpose as the mechanic's lien statutes. The beneficiaries of the legislation are given a lien under private contracts, recourse on the bond under public contracts."

This was, we submit, a question of statutory construction that was wholly within the determination of the Supreme Court of Tennessee. That court is presumed to know the history and purpose of Tennessee legislation, and its ruling that the intention of the Act was that this statutory bond should have the same qualities and incidents as a mechanic's lien was one within its right and power to make. And the court went on to say (R., 5):

> "Many cases hold that a mechanic's lien, being only a remedy afforded by statute for the collection of a debt arising out of contract, and not a vested right, may be abolished or modified by statute without impairing the obligation of the contract. *Bangor* v. *Goding,* 35 Me. 73, 56 Am. Dec. 688; *Hanes* v. *Wadey,* 73 Mich., 178, 2 LRA 498; *Bolton* v. *Johns,* 5 Pa. St., 145, 47 Am. Dec., 404; *Wilson* v. *Simon,* 91 Md., 1, 80 Am. St. Rep., 427."

So it is said in 17 RCL, p. 600:

> "A lien given by statute for the payment of a debt is but a part of the remedy afforded by law for its col-

> lection, and is subject to legislative control, and may be changed, or taken away completely, without in any wise interfering with or impairing the obligation of contracts."

The court said, however, that it was not necessary in this case to consider whether the remedy could be wholly abolished, since it was clearly within the power of the legislature to substitute a different remedy. As to this the court said (R., 6):

> "It is the general rule that where a statute deals with procedure only, it applies *prima facie* to rights of action that have accrued and, indeed, to pending actions. Lewis' Sutherland Statutory Construction, 2 ed. Vol. 2, p. 1226, 25 RCL, 791, 59 CJ, 1173.
>
> "The constitutional rights of one whose existing remedy is thus taken away are not infringed if the procedural statute provides him a new and effective ground instead. This is true even though the new remedy is not so convenient."

In support of this principle the court quoted from Tennessee cases and also cited *Tennessee* v. *Sneed,* 96 U. S., 69, and *Fourth National Bank* v. *Francklyn,* 120 U. S., 764.

The court stated its conclusion as to this aspect of the case as follows (R., 5):

> "If we concede that the materialmen's lien in the one instance or his recourse on the bond in the other instance enters into his contract and is a part thereof, and that a remedy so embraced cannot be impaired without impairing the obligation of the contract, still our construction of chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty. We construe the statute as regulating, after its passage, *the procedure* to be followed by all parties in respect to the final settlement of every highway contract, whether the contract itself was made before or after the enactment of chapter 80 of the Acts of 1929."

And after reviewing the two acts to show that they were in their nature procedural, the court added (R., 6):

> "Chapter 80 of the Acts of 1929 thus interpreted is retrospective only in the sense that it may be said to have altered the remedies previously existing for enforcing rights arising under earlier contracts. On its face the statute is retrospective to that extent."

And the court then states its finding that the substitute remedy is a fair and adequate one, as follows (R., 7):

> "It seems to us the substitute remedy was adequate and effectual, as well as conventional. We suppose that statutes exist everywhere to permit the release of property taken under the levy of an execution or attachment upon the execution of a good bond by the property owner. We have not heard the validity of such statutes questioned. We see no impropriety therefore in a statute permitting the general contractor to secure the release of his retainage upon the execution of a good bond.
>
> "Likewise the substitution of the refunding or indemnity bond for the contract bond seems unobjectionable. In either case, the bond would have to be approved by the Highway Commission. The protection offered by one bond would ordinarily be as good as the protection offered by the other. As a rule, bonds from surety companies are taken."

We have undertaken, largely by quotations from the opinion, to show the reasoning of the Tennessee Supreme Court on which its conclusion was based. The court construed the Tennessee statutes in the respect here under consideration as relating to procedural remedies, for which therefore the state could validly substitute other remedies.

The bond here was a statutory bond. It was made to the state, and the materialmen had nothing to do with its procurement or with the selection of the surety or with the payment of the premium. The state procured it as a guarantee of the performance of the contract and also to provide a remedy to the materialmen, who, because this was a public work, could not have recourse to the mechanic's lien laws.

It is said in complainant's brief (p. 14) that the court had in previous cases held that materialmen had contract rights in such a bond. The court had held that they could sue on such a bond, but the question had not arisen before of whether they had contract rights in the constitutional sense. Indeed, no cases are cited in the opposing brief holding that this Tennessee statute or that similar statutes elsewhere confer such contract rights.

This was the first occasion that the court had had to consider the question in this aspect, and, as shown above, the court construed the statute as providing a remedy for which the legislature could substitute another remedy without bringing the statute "into any constitutional difficulty."

The Supreme Court of Tennessee has interpreted the Act of 1917 as determining the procedure in the settlement of highway contracts, and the Act of 1929 as more fully regulating that procedure. It has determined that the procedure under the earlier Act provided a certain remedy which would be available to materialmen, and that the later Act provided that in certain circumstances—that is, where the retainage was taken down and a refunding bond executed—the recourse of the materialmen should be against this substituted bond. And it has determined that since both Acts in this regard related to remedial procedure the later Act was applicable to all contracts that had not been settled.

This is not a matter of construing a bond but of construing a statute; for the bond is a statutory bond and will have only the qualities and effect intended by the statute, and the statute is *sui generis*.

While it is true that in a case involving the question of whether an Act impairs the obligation of a contract this court will not be bound by the interpretation of the state court, yet it has said that it will follow and adopt that interpretation unless it is pretty manifestly wrong. The court stated the rule in this respect in *Millsaps College* v. *Jackson*, 275 U. S., 179, 72 L. Ed., 196, as follows:

> "While in cases like this 'we form our own judgment as to the existence and construction of the alleged contract and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration and it will in general be followed unless it seems to be plainly erroneous.'"

It is submitted that for the foregoing reasons the Act of 1929 was properly applicable to the determination of this case.

Respectfully submitted:

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Of Counsel.

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In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

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GEO. H. ARMISTEAD, JR.,
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In the

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No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

May it Please the Court:

We ask leave to file this supplemental brief for the reason that complainant's reply brief discusses the matter of a federal question which was not in its former brief, and for the further reason that, expecting this case to be tried in December, we had very few days in which to prepare our former brief.

(1)

In Determining Whether an Appellant has been wrongfully deprived of a Constitutional Right this Court Will not be limited to a Consideration of the Reasons Assigned by the State Court.

The decision of the Supreme Court of Tennessee construing the Act of 1929 was *directly responsive* to the issue made in the pleadings and in the assignments of error in that court.

The complaint in this Court is *not of the construction of the Act but of its application to this particular case.*

The question in this Court is: *Was complainant by reason of the application of the Act wrongfully deprived of a constitutional right?*

The Tennessee Supreme Court said in effect that the Act did not impair complainant's contract rights, and it is urged in complainant's second brief that this question of impairment is *the only one* that can be considered by this Court.

It is insisted that this Court must shut its eyes to the circumstance that complainant had sued and recovered on the Act of which it is here complaining because the State Court did not put its decision on that ground.

In *Murdock* v. *Memphis*, 87 U. S., 590, 634, this Court said that it would not be limited to a consideration of the opinion of the State Court, adding:

> "But after all the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry. . . ."

This broad examination is necessary in order that this Court may protect its jurisdiction against imposition.

The question in this Court, we submit, *is whether there has been a wrongful denial and not whether the State Court gave the right reason or the wrong reason or no reason at all.*

Manifestly, if the complainant here cannot upon sound principles of law, complain of the application of this Act—whether for the reason given by the State Court or for any other reason appearing in the record—complainant has suffered no constitutional wrong.

It has uniformly been held that this Court will determine for itself the substantial merits of such an appeal as this. *St. Louis & F. S. Ry. Co.* v. *State of Missouri*, 156 U. S., 478; *Levering & Carrigues Co.* v. *Morrin*, 289 U. S., 103. And that it will even re-examine the facts where they are so mingled with the claim of a federal right as to make this necessary in order to reach the merits of the application. *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S., 389, 394.

So in *Chicago, R. I. & P. R. Co.* v. *Perry*, 259 U. S., 548, 551, this Court said:

> "So far as can be gathered from its opinion there was no other legal ground upon which the judgment could be supported."

In the instant case the Tennessee Supreme Court found as *facts* in its opinion that complainant had filed its claim under the Act of 1929 and had sued on the bond given under that Act and had recovered and received the proceeds. (Our former brief, p. 2.)

In *City of New Orleans* v. *New Orleans Water Works Co.*, 142 U. S., 79, the City in its answer had claimed that a certain act impaired the obligations of its contract with the Water Company. The State Supreme Court in a majority opinion said nothing about this claim. This Court examined the question *in all of its aspects,* and held that the City could not make the claim because, among other reasons, it had itself *repudiated the contract that it was saying had been wrongfully impaired*—a reason quite analogous to that arising out of complainant's suit on the Act in this case, and a reason that was not given or suggested by the State Court.

It is urged that the State Court did not in terms hold that complainant was precluded because it had sued on the Act, and that this was a non-federal ground and cannot, therefore, be considered by this Court, citing *Grayson* v. *Harris*, 267 U. S., 358. That rule, we submit, refers to grounds which have *no relation to the question of federal right.* In the Grayson case the reference was to the state statute of limitations, which was a ground exclusively for the State Court. The merits of that defense had nothing to do with the merits of the federal question.

But here, on the other hand, the complainant is claiming that the Act of 1929 was wrongfully applied to the case, and almost in the same breath is stating that it invoked the Act and sued on it. Manifestly complainant's suing on the Act and its recovery on the refunding bond are not collateral as would be a question of the statute of limitations, but are vital ingredients in the determination by this Court of whether the application of the 1929 Act was wrongful.

(2)

As to the Argument that Complainant, notwithstanding it invoked the 1929 Act, was surprised by the Construction given the Act by the Supreme Court and has therefore the Right to Repudiate the Act.

It is urged (Reply Brief, pp. 3, 4) that complainant was taken by surprise when the Supreme Court construed the 1929 Act as meaning that the taking of a refunding bond would discharge the contract bond.

But the argument of "surprise" is available merely to explain why the federal question was not raised sooner, as is made plain in the passages quoted by counsel from *Saunders* v. *Shaw*, 244 U. S., 317, and *Great Northern Ry. Co.* v. *Sunburst Oil Refining Co.*, 287 U. S., 358.

There is nothing in those cases to support the view that a litigant may sue and recover upon an Act and exhaust its benefits and then later on in the same suit claim that the Act is not applicable to the case.

A litigant *who has the right to assail the constitutionality of an Act* on federal grounds may under the circumstances of the Saunders case be excused for not making the question sooner, but this principle cannot help one who has voluntarily elected to sue and recover on rights given him under the Act and has actually received and appropriated its benefits, and who, therefore, *has not the right to assail the Act.*

And it is to be added that the record shows that there was no "surprise" here in the sense and meaning of the Saunders case. Complainant sued on the bond given under the 1929 Act and was at once notified in appellant's answer of the contention that the taking of the bond under the 1929 Act discharged the contract bond, and by the ruling of the Chancellor that the refunding bond released all rights to the retainage provided for under the earlier Act.

There was, therefore, no surprise unless it be in the fact that the Supreme Court sustained appellee's construction of the Act and not appellant's.

(3)

As to the Argument that Complainant could Recover on and Exhaust the Refunding Bond without Prejudice to its Right to sue on the Contract Bond.

1. Complainant argues (Brief, p. 10) that it had the right to sue on the Act of 1929 and then when it "lost" turn around and sue on the 1917 Act. That might be true if, for a mistake of law, complainant had *lost.* But complainant *did not lose.* Manifestly complainant could not sue and recover on the 1929 Act and then after exhausting the benefits of the Act repudiate it and claim that it was not applicable.

If it was not applicable, complainant had no right to the benefits of it, which nevertheless it received and appropriated. It went forward with the suit and received the proceeds of the refunding bond with a full understanding of the contention of appellee that the taking of a refunding bond would discharge the contract bond.

2. It is said in the brief (p. 12) that "no objection was raised by the appellant when the Chancellor granted a judgment against the contractor and the appellee." But appellee raised objection, for it had denied liability in its answer (R., 32) and it excepted to the judgment of the Chancellor against it (R., 44) and it assigned errors both in the Court of Appeals (R., 45) and in the Supreme Court (R., 69) on the ground that the taking of the refunding bond discharged the contract bond.

3. Complainant argues that it could sue on the bond issued under the 1929 Act as a "voluntary" bond, citing *Lake Charles Planing Mill Co.* v. *Grand Lodge* (La.), 53 So., 550, and *Love* v. *McCoy* (W. Va.), 94 S. E., 954, and *Fidelity & Guaranty Co.* v. *Rainey,* 120 Tenn., 357. Those cases refer to bonds that were *irregular or not prescribed by statute.* And there was in those cases only one bond. The Courts held that notwithstanding such bond was "irregular" it might be held as a "voluntary" bond.

Those cases are plainly not in point. *There was here no irregular bond.* There was a bond issued pursuant to the Act of 1917 and another issued pursuant to the Act of 1929. *Both were in all respects regular and in exact conformity with the statute.* There was no question that the sureties were bound. The sole question was as to the interpretation of the later Act, as to whether the taking of the later bond discharged the prior bond.

Complainant might have undertaken to question the applicability of the 1929 Act. But it did not. The pleadings and assignments show that the case was tried throughout on the understanding that that Act was applicable.

It is not disputed that the Act of 1929 was constitutional. And when complainant sued and recovered on it, that Act, with the interpretation given it by the State Supreme Court, became and was as completely applicable as if it had been enacted before complainant's rights arose.

Respectfully submitted,

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Of Counsel.

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In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL & IRON COMPANY,
Appellant,
vs.
NATIONAL SURETY COMPANY,
Appellee.

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, APPELLEE.

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INTERNATIONAL STEEL & IRON COMPANY,
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NATIONAL SURETY COMPANY,
Appellee.

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, APPELLEE.

May it Please the Court:

Since this case was argued here for appellant in January the Tennessee Supreme Court has *supplemented its opinion* to show the following:

(a) That appellant's assignment of error and accompanying brief in that court did not raise any federal question; that the case was heard and the court was divided and ordered a reargument as to "the constitutionality, construction and applicability" of Chapter 80 of the Acts of 1929; and that prior to the reargument appellant "filed a second brief . . . raising the constitutional questions" (Sup. R., 13); and

(b) That the Tennessee Court in its references to the constitution "intended to express the opinion that the said Act so construed did not impair the obligation of contracts in violation of Section 20 of Article I of the Constitution of Tennessee and the contract clause of Section 10 of Article I of the Constitution of the United States . . ." (Sup. R., 10).

I.

Appellant recovered in the lower court on a statutory bond and is here denying the applicability of the statute. In *Daniels* v. *Tearney,* 102 U. S., 415, this court said that a statutory bond could not be valid and the statute invalid:

> "The bond as a statutory instrument cannot have more validity than the statute which prescribed it . . . *To hold the bond valid as a statutory bond and the statute void would be an inversion of reason.*" (Italics ours.)

And this court went on to say that even where the statute was void it must nevertheless be treated as valid as to persons who had invoked it and taken advantage of its provisions. The statute in that case provided for postponing the enforcement of executions upon giving a certain statutory bond. The statute was in aid of the Virginia Ordinance of Secession and was void, but the bondsmen had invoked the statute and received its benefits, and this court said that they could not be heard to deny the validity of the bond.

The court cited and approved earlier cases in support of the principle and quoted from *Ferguson* v. *Landram,* 5 Bush., 230, as follows:

> "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or *from which he derived an interest and consideration, and then keep the consideration and repudiate the statute?*" (Italics ours.)

In the instant case appellant has received some $40,000 "through a statute" and now asks the aid of this court to "keep the consideration and repudiate the statute."

So in *United Fuel & Gas Co.* v. *Railroad Commission of Kentucky,* 278 U. S., 300, the Gas Company denied the validity on constitutional grounds of certain powers of the State Railroad Commission, whose authority, however, the Gas Company had theretofore invoked. The court said:

> "But this objection, and that as well to the constitutionality, on state grounds, of the statute creating the commission and defining its powers, are not available to appellant in the present suit. *It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States.* (Italics ours.) *Wall* v. *Parrott Silver & Copper Co.,* 244 U. S., 407, 37 S. Ct., 609, 61 L. Ed., 1229; *Electric Co.* v. *Dow,* 166 U. S., 489, 17 S. Ct., 645, 41 L. Ed., 1088; *Eustis* v. *Bolles,* 150 U. S., 361; 14 S. Ct., 131, 37 L. Ed., 1111; *Hurley* v. *Commr. of Fisheries,* 257 U. S., 223, 42 S. Ct., 83, 66 L. Ed., 206; *St. Louis Malleable Casting Co.* v. *George C. Prendergast Co.,* 260 U. S., 469, 43 S. Ct., 178, 61 L. Ed., 351.

In *Wall* v. *Parrott Silver & Copper Co.,* 244 U. S., 407, the Parrott Company had sold its property to the Anaconda Company under a statute which allowed dissatisfied stockholders to institute a certain statutory proceeding to fix the value of their stock. The plaintiffs as stockholders instituted such a proceeding and then brought this suit, alleging that the statute deprived them of property without due process of law.. This court said:

> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other states

> and of a seemingly equitable character, for the reason that the appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them. *Great Falls Mfg. Co.* v. *Atty. Gen.*, 124 U. S., 581, 31 L. Ed., 527, 8 Sup. Ct. Rep., 631; *Electric Co.* v. *Dow*, 166 U. S., 489, 41 L. Ed., 1088, 17 Sup. Ct. Rep., 645; *Pierce* v. *Somerset R. Co.*, 171 U. S., 641, 43 L. Ed., 316, 19 Sup. Ct. Rep., 64; *Leonard* v. *Vicksburg*, S. & P. R. Co., 198 U. S., 416, 422, 49 L. Ed., 1108, 1111, 25 Sup. Ct. Rep., 750. *They cannot claim the benefit of statutes and afterwards assail their validity.* There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be." (Italics ours.)

Other cases illustrating this principle are *Pierce Oil Corp.* v. *Phoenix Oil Refining Co.*, 259 U. S., 125, and *Booth Fisheries* v. *Industrial Commission*, 271 U. S., 208.

Accordingly, the sureties in the statutory bond involved in the instant case were liable only in the way and to the extent prescribed by the statutes. *Neither bond could be separated from its statute so as to make the bond available and at the same time rule out the statute.* This court will give consideration to the opinion of the state court but will determine for itself whether the appellant seeking its aid has suffered a constitutional wrong. And the question of whether the appellant *is entitled to invoke the constitution* is inherent in this determination.

It is fundamental, as illustrated in the above cases, that a litigant has suffered *no constitutional wrong* by the application to his case of a statute which he has invoked and availed himself of. Where a state court urges estoppel as a reason for refusing to consider a constitutional claim, this court will upon well settled principles determine for itself whether this refusal was rightful or wrongful. And conversely, where the litigant, having invoked and recovered upon an act, has upon well settled principles suffered no constitutional wrong by reason of its application, this court will not be constrained to recognize a constitutional wrong.

Thus in *Winona, etc., R. Co.* v. *Town of Plainview*, 143 U. S., 371, this court said, at pages 393-4:

> "Although the plaintiff in error was held liable by the state court by virtue of the Act of 1881, *that did not raise a federal question because the liability was one assumed voluntarily* by the plaintiff in error." (Italics ours.)

In *City of New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S., 79, this court said that the federal question must have some foundation, and quoted from *Millingar* v. *Hartupee*, 6 Wall., 258:

> "If a right were claimed under a treaty or statute and on looking into the record it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decision of a state court that the right claimed did not exist."

And the court went on:

> "Applying the principle of this decision to the present case we think that before we can be asked to determine whether a statute has impaired the obligation of a contract *it should appear* that there was a legal contract subject to impairment *and some ground to believe that it has been impaired.*" (Italics ours.)

Where, in the language of the Winona Case above, "the liability [arising from the statute] was one *assumed voluntarily* by the plaintiff in error"—in other words, where it appears that the plaintiff in error has sued and recovered on the statute that he is complaining of—it is submitted that there is not, in the constitutional sense, any "ground to believe that it [the contract] has been impaired."

II.

Under the construction given the 1929 Act by the Supreme Court of Tennessee—a construction that does not involve any federal question—*there are no circumstances under which any litigant can recover on both statutory bonds. That is the law of Tennessee.*

If appellant, after recovering on the 1929 Act, was entitled at this late stage to repudiate that act, it could not do so without restoring the benefits it had received from the act, which it has not offered to do.

If appellant's complaint is sound, it could not be deprived by the Act of 1929 from recovering on the bond given under the Act of 1917; but by the same argument it could not recover on the 1929 bond.

The constitution cannot be made a cloak for fraud. *There is no federal question involved in the ruling by the Tennessee court that the two bonds are alternative.* It is respectively submitted that that ruling must be given effect, and that if appellant has recovered on the wrong bond it cannot both retain the benefits and recover on the other bond. That is a principle of common honesty from which appellant is not protected by the constitution.

III.

The remedy of the second bond was not available to appellant when it entered into its contract. It nevertheless elected to recover on that bond and to receive the benefits of it. *In affirming that recovery the Supreme Court of Tennessee merely affirmed what appellant had elected to do,* and at the same time the court said that the later act merely substituted a new and adequate remedy.

The case of *Abie State Bank* v. *Bryan* (Weaver), 282 U. S., 765, is somewhat analogous. There had been a Bank Guaranty Law of Nebraska under the terms of which the banks operating in the state were assessed to make up a guaranty fund to protect depositors. This guaranty stood back of the obligation of the banks to their depositors. Later the guaranty law was repealed. The depositors then made the claim that they had acquired contractual rights in the fund which could not be impaired by the repealing act. This court said:

> "The Bank Guaranty Law provided for a fund to be raised by assessments upon all the state banks, and while this was regarded as an important safeguard for all depositors, it was but a police regulation, the sanction of which lay in the constitutional power of the state and not in contract. See *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S., 379, 385-7, 24 S. Ct., 107, 48 L. Ed., 229. And this is the view that has been taken by state courts which have had occasion to consider this question in connection with legislation by which relief has been sought from the difficulties encountered in the continued operation of bank guaranty plans." (Citing cases from state courts.)

Respectfully submitted,

CHARLES C. TRABUE,
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WILLIAM HUME,
GEO. H. ARMISTEAD, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 252.—October Term, 1935.

International Steel and Iron Company,
Appellant,
vs.
National Surety Company.

Appeal from the Supreme Court of the State of Tennessee.

[March 30, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

The present appeal challenges a statute of Tennessee on the ground that, as construed and applied, it impairs the obligation of a contract in contravention of Article I, Section 10 of the Federal Constitution.

March 12, 1928, National Construction Company made a contract with the State, through its Department of Highways and Public Works, for the construction of a bridge. An Act of 1917 required such a contractor to furnish a bond with surety to protect the State and to secure payment to persons furnishing materials, supplies, and labor for the project.[1] The company executed such a bond with the appellee as surety. The appellant agreed with the Construction Company to furnish certain labor and materials for the erection of the bridge. Upon completion of the structure, the appellant claimed a balance of about $59,000. There remained in the possession of the Highway Department some $77,000 which had been retained out of the contract price as directed by the Act of 1917. In the meantime, the Act had been amended on April 11, 1929,[2] to provide that instead of withholding the retained percentage pending the presentation of claims by sub-contractors, and paying into court so much as might be necessary to answer suits brought on those claims, the Commissioner of Highways might, upon the date of final settlement, release and pay to the principal contractor the amount so retained, against a refunding bond with proper surety, conditioned for the payment of valid claims of sub-contractors.[3] Pursuant to this amendatory act, the Commissioner, without notice to or consent of the appellant, made final settlement with the Construction Company and paid it the retained percentage, taking a refunding bond with the Equitable Casualty and Surety Company as surety. Thereupon, the appellant filed a bill in the Chancery Court of Davidson County against the Construction Company, the appellee as surety on the contractor's bond, the Commissioner, and the Equitable Company as surety on the refunding bond, reciting the facts and praying a decree for the balance due under its contract. The Construction Company answered and cross-claimed for alleged breach of contract, asserting that there was no sum due the appellant. The appellee answered asserting that the payment of the retained percentage and the acceptance of a refunding bond released it as surety from liability to the Department of Highways or to sub-contractors. The Commissioner's answer recited his acts in the premises. The appellant replied to the cross-bill. A decree was entered in favor of the Commissioner against the Construction Company and Equitable Company on the refunding bond. Subsequently the Commissioner informed the court that the Equitable Company had become insolvent and it was proposed to substitute a refunding bond of the Construction Company as principal and Consolidated Indemnity and Insurance Company as surety in the penal sum of $40,000, in place of the original refunding bond, and lodge the new bond in court, such action not to release the Construction Company under the original refunding bond but to operate as a release of the receiver and liquidating agent of the Equitable Company. It was ordered that the bond be taken and lodged in court to await the outcome of the litigation.

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[1] Chapter No. 74 Public Acts of Tennessee 1917 (p. 217). By Sec. 6 (p. 223) it is provided: " . . . . All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work. . . . Not more than ninety per cent of the contract price shall be paid on any contract until it is completed and the work is accepted. Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his sub-contractors, or his agents, has been fully paid for and all laborers and other employees working for him, his sub-contractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days' notice in some newspaper . . . that settlement is about to be made and notify (*sic*) all claimants to file notice of their claim with the Secretary of the Department. The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims . . . of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction."

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[2] Public Acts of Tennessee 1929, Chapter 80. (pp. 173, 175.)

[3] "SECTION 1. . . .

(a) The Secretary of the Department [now the Commissioner of Highways and Public Works] shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow claimants to sue and prove their claims against the contractor or his agent, in some court of competent jurisdiction. In the event suit is brought against the contractor within the said sixty days from the date of the last advertising, by any claimant, the Department or its officers shall pay the amount of said claim into court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.

(b) On the date set for full and final settlement with the contractor, the contractor may make proper refunding bond to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission, whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full."

The chancellor thereafter heard the cause on the merits, found in favor of the appellant for a balance of approximately $58,000, held that the amendatory act of 1929 did not affect the appellee's liability under the bond, but substituted a refunding bond in lieu of the moneys retained by the Commissioner, that the appellant should look first to the refunding bond and, after its exhaustion, recover from the appellee any amount remaining unpaid. The appellee took the case to the Court of Appeals of the State, where it insisted upon its position that the acceptance of a refunding bond and the release of the retained percentage operated to discharge its bond. That court reversed the chancellor's decision, holding that the act of 1929 was prospective in operation and did not apply to the State's contract with the Construction Company; that the action of the Commissioner in taking a refunding bond and releasing the retained percentage was unlawful, operated to the prejudice of the appellee as surety on the contract bond and released it from liability. Both appellant and appellee were granted writs of certiorari by the Supreme Court of Tennessee. The former assigned error to the holding that the action of the Commissioner in paying over the retained funds and taking a refunding bond released the appellee as surety. The latter assigned error to the holding that the amendatory act of 1929 was inapplicable to the contract in question and that the Commissioner was not authorized thereby to proceed as he did, and thus satisfy and discharge the obligation of appellee's bond.

Upon grounds differing from those stated by the Court of Appeals, the Supreme Court affirmed the decree. It held the amendatory act retroactive and applicable to the contract of the Construction Company; and the Commissioner's action lawful and effective to supersede and annul the contract bond.

In the course of the opinion the Court said: " * * * our construction of Chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty." Except for this statement, the record failed to disclose that a question under the Federal Constitution had been presented or decided. In the circumstances, this court had no jurisdiction upon appeal. Counsel for the appellant requested at the bar a continuance of the cause to afford opportunity for amplification of the record disclosing the basis of decision.[4] The application was granted, a petition was filed in the court below, and, in response thereto, the court added to its opinion a recital that a reargument had been ordered upon "the constitutionality, construction, and applicability" of Chapter 80 of the Acts of 1929, and, prior to reargument, counsel for the appellant had filed a brief raising the federal constitutional question under Article I, Section 10, and the Court intended to express the opinion that the Act, as construed by it, "did not impair the obligation of contracts in violation of * * * the contract clause of * * * the Constitution of the United States." These additional proceedings have been certified and added to the record. Upon the record as thus supplemented we have jurisdiction.

The contention is that Chapter 80 of the Acts of 1929, as construed, releases and discharges the obligation of the appellee's bond to pay the balance due the appellant, and that such destruction of the obligation cannot be justified by substituting a right of action on another bond without appellant's consent. The appellant says that under the local law the bond given by the appellee is of a dual nature, running both to the State and to sub-contractors; and its execution created a direct contractual relation between the surety and those who furnished material and labor for the erection of the bridge, the obligation of appellee to appellant coming into existence at the moment the latter made its contract with the Construction Company.[5] The Supreme Court of Tennessee, though so holding, thought the Act of 1929 merely affected the appellant's remedy without impairing its substantive rights. It treated the Act of 1917, pursuant to which appellee gave its bond, as having "the same general purpose as the mechanic's lien statutes." It said: "The beneficiaries of the legislation are given a lien under private contracts, recourse on the bond under public contracts." After stating that it was unnecessary to decide whether a mechanic's lien, —a remedy created by statute and not by the contract of the parties,—may be abolished or modified by statute without impairing the obligation of the contract or, on the contrary, the lienor has a vested interest in the remedy, upon accrual of his lien, of which he cannot be deprived without such impairment, the court disposed of the appellant's contention thus:

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[4] Compare *Lynch* v. *New York*, 293 U. S. 52.

[5] *City of Bristol* v. *Bostwick*, 139 Tenn. 304, 310, 317; *Cass* v. *Smith*, 146 Tenn. 218, 227, citing and quoting *Equitable Surety Co.* v. *United States*, 234 U. S. 448; *Standard Oil Co.* v. *Jamison Bros.*, 166 Tenn. 53, 55.

> "If we concede that the materialman's lien in the one instance, or his recourse on the bond in the other instance, enters into his contract and is a part thereof, and that a remedy so embraced cannot be impaired without impairing the obligation of the contract, still our construction of chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty. We construe the statute as regulating, after its passage, the procedure to be followed by all parties in respect to the final settlement of every highway contract, whether the contract itself was made before or after the enactment of chapter 80 of the Acts of 1929."

This view seems to us to confuse the remedies for the enforcement of two distinct contracts involved in every similar situation. The sub-contractor has a contract with the principal contractor, but none with the owner. The mechanics' lien law gives the sub-contractor no additional redress against the principal contractor for breach by the latter of his sub-contract. Because the sub-contractor's labor and materials go to enhance the value of the owner's property, the law places that property in peril of a lien for payment of the sub-contractor, unless the owner sees that he is paid. Abolition of the lien destroys no remedy which the sub-contractor could have invoked as against his employer, with whom alone he has a contract. The Act of 1917, on the other hand, instead of creating a right of lien against the owner, who is a stranger to the sub-contract, requires that if a bidder for public works is to become the contractor therefor he must procure a bondsman for the payment of his sub-contractors. The statute itself confers no contractual right on any sub-contractor, nor does it by its own force confer upon him any new remedy for the enforcement as against the principal contractor of the obligation of any contract the two may make. A bondsman is invited to come forward and agree to indemnify the sub-contractor. If he does so, he acts voluntarily. For a consideration sufficient to move him, he contracts directly with the sub-contractor to assure the satisfaction of his just claims against the principal contractor. The remedy for a breach of this undertaking is an action at law.

The appellee voluntarily gave its bond. How does Chapter 80 of the Acts of 1929 affect the obligation of that contract? As construed by the Supreme Court of the State, it releases and discharges the obligation of the bond, and substitutes therefor the obligation of another bond without the acquiescence of the obligee. This is not to substitute a new for the old remedy against the surety. It is to declare the surety's obligation unenforceable,—in short, no longer a subsisting obligation. Beyond doubt the statute thus violates the contract clause of the Constitution.

The respondent insists that as the appellant joined the Equitable Company, surety on the refunding bond, as a defendant, it sought to take advantage of the amendatory act of 1929 and is now estopped to question the constitutional validity of the statute. Appellant replies that the suit went upon the theory adopted by the chancellor that the amendatory act was not retroactive so as to release the earlier bond but intended merely to substitute a refunding bond in the place of the funds retained by the Highway Commissioner which, under the original act, were also held for satisfaction of the appellant's claim. Such a construction of an act which had not been passed upon by any court was permissible and if, as now appears, the appellant was in error in so construing the act, the mistake cannot be made the basis of an estoppel. In both appellate courts the appellant insisted on its original view that the Act of 1929 did not operate to discharge the obligation of the appellee's bond. The appellee asserted no estoppel in either of those tribunals. Not until the decision of the Supreme Court was there a holding that the act retroactively affected the enforcibility of the bond. Not until then was there occasion for appellant to urge that, if so construed, the act would impair the obligation of the bond. As we have indicated, the record discloses that when this construction of the act appeared probable the appellant promptly raised the constitutional question. It cannot be estopped so to do by its previous insistence upon a construction which would render the statute consistent with the Act of 1917 and present no constitutional difficulty.[6] The appellee says that estoppel, a non-federal ground, adequate to support the judgment, was in the case from its inception. The point was not made or considered in the state courts. The validity of the act was adjudged on the issue of impairment of the obligation of the appellee's bond. We do not, therefore, consider the defense of estoppel.

"The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not."[7]

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[6] Compare *Saunders* v. *Shaw*, 244 U. S. 317; *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 367.

[7] *Grayson* v. *Harris*, 267 U. S. 352, 358.